LEGAL DOCTRINE AND SOCIAL PROGRESS

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BY

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TO MY REVERED AND HONORED FRIEND,
JUSTICE OLIVER WENDELL HOLMES,
WHOSE FREEDOM FROM OVER-DEVOTION TO TECHNICALITIES AND WORSHIP OF PRECEDENT IS DESERVING OF ALL PRAISE, AND WHOSE PROFOUND KNOWLEDGE, BREADTH OF VIEW AND LIBERAL USE OF COMMON SENSE IN APPLYING THE PRINCIPLES OF THE LAW TO ACCOMPLISH JUSTICE ON THE FACTS OF EACH CASE, ENTITLE HIS JUDGMENTS, AS A MEMBER OF THE SUPREME COURT OF MASSACHUSETTS AND NOW OF THE UNITED STATES SUPREME COURT, TO THE RESPECT AND ADMIRATION OF THE BENCH, THE BAR AND THE PUBLIC, THIS BOOK IS AFFECTIONATELY AND RESPECTFULLY DEDICATED

PREFACE

THE stupendous social problems of this age force us to face the question—shall remedy be found by evolution or revolution? The answer to this question is of momentous importance. It determines one's attitude toward the problems and marks the essential nature of his activities. If he believes that revolution is "*the* way out" he will very likely be unsympathetic with reforms, and impatient of "palliative measures." He will clothe his ideals with abundance of detail and refuse to pave the road or even blaze the trail by which they must be reached. He complacently postpones all progress to that joyful day when his perfect ideal will be realized in one grand *coup d'état.* The man on the other hand who believes in reforms and evolutionary methods of social progress will do what he can each day to gain an inch toward things as they ought to be.

A man is an evolutionist or a revolutionist in the matter of pursuing his ideal, according to the view he takes of the law, the constitution and chart of present civic institutions. If he

considers the law fundamentally wrong and our present society utterly hopeless, he will be a revolutionist. If he canonizes the law of the past, making it the guide and measure of all future law, and so enslaving society to the corpses of its dead, he will be a reactionary. If, however, he estimates the law on a utilitarian basis, and without any bondage to precedent accepts it as a power for progress to be developed rather than cast aside, he will be a social evolutionist.

It was to this school of thought that the writer of this book belonged. He was a reformer, cherishing the highest of ideals yet always demanding of himself a reason for his faith and a proof of its practicability. He felt that a better and truer conception of the law was one of the great needs of the day and that it would help the cause of social progress. His wide knowledge of the law, his work as a legal writer, and his experience as an educator, coupled with his national services in behalf of true democracy qualified him peculiarly to write upon this subject.

For several years before his death Professor Parsons accumulated notes and developed plans for the present volume, but its actual writing was not begun until the days of his final illness.

To the reader who has noted the prevailing lack of any dynamic conception of the law, or any adequate understanding of it as an evolutionary force, or who sees wrongs and social barbarism entrenched behind the courts and constitutions that are inelastic, and that try to confine the State to police functions, this book should bring a hope of better things. It reaches fundamentals. The path of democratic progress is not over a morass, but over rock.

RALPH ALBERTSON.

Boston, February 1, 1911.

CONTENTS

LEGAL DOCTRINE AND SOCIAL PROGRESS

I

THE LAW AS A FORM OF CONTROL

The law is a means of molding and controlling men—one means by which the controlling power in a community bends individuals and institutions to its will. It consists of rules and regulations prescribed by the governing authority and requires obedience from the governed. The law supports its requirements by establishing various safeguards and means of protection, such as police, health boards, inspectors, etc.; it provides for redress to those who are injured by its violation and for public prosecution of persons guilty of the serious offenses classed as crimes; it then punishes by fine, imprisonment, removal from office, civic disqualification, or by other physical, financial or political penalty.

The law is but one of various means of control. There are other means of control, such as religion, superstition, ethical teaching, public

opinion, etc. Men use physical force, persuasion, education, social ostracism, boycott, blacklist, all sorts of economic, political and social pressure—court, legislature, school, press, pulpit, platform, market, bank, factory, etc., etc., in the effort to make other men do as they wish. Every man and every group of men is constantly striving consciously or unconsciously, effectively or ineffectively to control the world in his or its interest.

The object of law is happiness. Happiness is the object of all human endeavor. Misery is not sufficiently attractive to make men cultivate it intentionally for its own sake. They may cultivate it through ignorance or weakness which leads them to prefer a present gratification to a future good. Or they may cultivate certain forms of it intentionally as the means of securing greater bliss in other directions, as when an ascetic persecutes the flesh for the sake of his spiritual ideals and the happiness he believes will come to him in a future life. But however much the matter may be obscured by ignorance or the conflict of mind and body, the underlying motive of human effort is always the pursuit of happiness. The law is a means to this end, used with more or less success according to the enlightenment and power of those who enact and enforce it.

Leading means of control contrasted. Law, religion, public opinion, etc., are born of social life and develop with that life. In a state of isolation none of the molding forces exists except in the embryonic form appropriate to family life.

Religion acts upon conduct through the conscience and the moral emotions, through the love of good and the hate of evil, or what is supposed to be good and evil. It is an internal, intangible compulsion aided externally by association and sympathy.

Public opinion acts upon us through the favor and disfavor, association and ostracism, approbation and disapprobation of our fellowmen. It is a massive, external, intangible control.

The law molds human conduct by means of the organized application of physical compulsions to the persons or property of the people. It is a massive, external, tangible control.

Law too costly to be used to enforce the whole moral law. Which forms of control should be used in any particular case or class of cases depends on the nature and training of the persons to be controlled and the peculiar circumstances, especially in relation to cost, certainty, directness, definiteness and practicability. It costs a great deal in time, money and friction

to set the cumbrous machinery of the law in motion and to carry it through to judgment and execution; to use that method of control for small offenses against the moral law, such as ordinary lying, explosions of ill-temper, common breaches of courtesy, etc., would be to incur far greater evils than those intended to be repressed. Such offenses should be dealt with by public opinion and the inner ethical control which work with the minimum cost and the maximum of effectiveness.

The law draws the line at the average man. It would be folly to attempt to use the law to punish the ordinary shortcomings of the average man. Any system of law that would make the mass of human conduct subject to suit or prosecution, or bring the mass of men into court or make them liable to be brought into court, would be simply intolerable. The law may be used to punish the sins of our savage blood, to press the defective classes into shape and bring the lagging minority up to the average standard. But the common sins of the average man should be left to education, public opinion and the complex mass of family and social influences that are gradually molding human nature to higher and higher types. The law draws a broad line at the average level civilization has attained—it requires only good

faith and due care, that is, the degree of honesty, care and skill which an ordinary man would exercise under similar circumstances. It does not require the honesty, skill and care exhibited by the best (a rule which would subject the bulk of mankind to legal liability and prosecution) but only demands the virtue of the man of ordinary character, intelligence and care. The moral law requires of all the conduct of the best and more; but the civil law demands only the goodness of the average type. The average man, the man of ordinary character, the man of ordinary providence and intelligence, is the fundamental standard in the civil law. If you come up to that standard you are secure from legal liability, or should be if the law conforms to its theory; but if you fall below that standard you may be liable both to society and to those individuals injured by your defective conduct.

The law waits for crystallized public opinion. So again uncertainty as to the character of the act, or the proof of it, may bar the law as a remedy. Society is not yet agreed that the use of intoxicants (I am not referring to the organized liquor traffic), narcotics or drugs, stock speculation, sensational journalism, or useless duplication of industries, stores, factories, etc., is immoral; the legal presumption

is always with liberty till experience makes it clear, beyond a reasonable doubt, that the conduct in question is against the interests of society. Till then the matter should be left to ethical discussion, to the pressure of public opinion and its allies. Gradually experience works such questions out and brings the community to substantial unity of judgment. Two notable examples have occurred in recent years. Pugilism and the lottery not many years ago were in the free field, outside the law, subject only to public opinion and ethical education. But as experience made it more and more clear that these things were contrary to the social well-being, public opinion became substantially a unit, and an increasingly vigorous unit against them, until this public opinion or ethical judgment of the people was crystallized into law. Now it is difficult for pugilists to find a place in this country where they can fight with impunity, and lotteries are denied the use of the United States mails by Federal enactment. Prize fights and lotteries have been transferred from the doubtful or disputed class to that of clearly ascertained and legally repressed immoralities.

The law enters only where proof is possible. Where the facts are difficult of proof the law is

equally excluded. Neither is it adapted to deal with sins of envy, jealousy, overeating, vices of secret character, etc. In the field of evidence the law draws broad lines. It will not deal with evils that in their nature are generally incapable of clear proof. It puts up the bars against hearsay evidence. It requires a witness to tell what he knows of his own knowledge, not what he infers from what he has heard others say. It requires the best evidence the nature and circumstances of the case permit.

The law is peculiarly adapted to cases of direct, pecuniary loss where the damage can be definitely ascertained, but it is not so well adapted to cases of indirect, indefinite injury. If A shoots B's horse, the damage is direct and can be quite definitely estimated. But if A injures B by personal insults or hurts his feelings or his business, by crippling in person or property B's friend, partner, client or customer, the damage to B is so indirect and indefinite that the law will not attempt to deal with it. Here again broad lines are drawn on grounds of cost, simplicity and justice to the average man. The law will not look to the remote and indefinite results of human action; it looks rather to the direct and definite results, the

natural and proximate consequences, which the ordinary man must be presumed to contemplate as the natural result of his conduct.

Form of control depends on practicability. The question of practicability is very important in relation to the form of control that ought to be used. When the boodle aldermen of Philadelphia and their allies had the machinery of the law, such as nominations, elections, counting of ballots, courts, etc., in their control and were about to pass the fraudulent gas ordinance of the United Gas Improvement Co., over the veto of the Mayor, it was clearly impracticable to reach them by way of the law, but public opinion attacked and conquered them with ease. They, their wives, and their children were ostracized, hooted on the streets, reviled in public, boycotted, and socially outlawed. They soon found this treatment unendurable, and one by one gave up their boodle allegiance for the time at least and avowed their intention of voting against the ordinance. On the other hand a burglar or bank robber would probably care little for public opinion in any form. Some of the giant railway rebaters, such as Rockefeller and Armour, with millions to buy subservience and homage from those about them, seem practically impervious to the adverse judgments of society. Nothing but imprisonment or total

forfeiture of property and industrial power, would seem to be adequate in such cases.

The law may go too far. What form of control *will* be used in any case depends in a large measure on the character, temper and motives of the governing authority. An underestimate of the value of liberty, and an over reliance on legal compulsion may lead to arbitrary and burdensome laws against Sunday work, theater going, and efforts to regulate by statute the diet and dress and even the beliefs of the citizens.

II

THE LAW AS AN EXPRESSION OF THE INTERESTS OF THE GOVERNING AUTHORITY

In a monarchy the law expresses the will of one person and is used to mold the community to his purposes. In an aristocracy the law represents the will of a class and is used to mold society to its interest. In a democracy the law represents the will of the people and is used to mold society in the interest of the masses. Any one of these governments may mistake its interest, but it will constantly seek it, and in finding it will make the law conform to such interest in proportion to its experience and intelligence.

The real power not always indicated by form of government. All three forms of government may be shams, appearances, masks for realities quite different from the nominal form. A monarchy in name may be in fact an aristocracy, as in England; and an aristocracy in name may be really a monarchy if the actual dominating power is in one man. So in a republic, so-called, if a military despot, civic boss,

political machine, or group of plutocrats, controls nominations and elections and gets the law made in whole or in part according to its will instead of in accord with the people's will, the government is to that extent a monarchy or aristocracy in fact, whatever it may be in name. Rome was a republic in name during the whole of Julius Cæsar's despotism. He is sovereign whose will is in control. If the agents through whom the people act make laws the people do not want, and refuse to make laws the people do want, they are to that extent the actual sovereigns. Under the forms of democratic government the people may in reality have little or nothing more than the privilege of periodically electing a new set of masters from nominees selected by bosses, machines or dominating groups, plutocrats and politicians in whose interest the so-called "representatives" of the people really act. Under the New England town meeting system with an intelligent and public spirited citizenship, in Switzerland with the initiative and referendum and proportional representation, and in New Zealand with direct nominations by popular petition (completely eliminating the caucus and convention) and universal questioning and pledging of candidates, the people's will is in substantially complete and continuous control.

With all these things together—direct nomination by petition, the initiative and referendum, proportional representation and an intelligent and public spirited citizenship—there will come the full realization of democracy, government by and for the people in full bloom, free from any taint of individual or class legislation.

The law in a real democracy. In such a democracy the law will be the embodiment of the principles of justice and common sense, and will encourage good and repress evil with impartial hand and the minimum of cost and friction. Under any form of government this must be true in large degree, for no government could long exist on any other basis. A system of law that on the whole established injustice, repressed good and encouraged evil—discouraged order, industry and fair dealing, and encouraged disorder and aggression, theft, robbery, murder, arson,—could not long endure; it would breed anarchy and work the dissolution of society and of itself. But while the law must conform to justice and the common good in a large degree under any lasting government, the deviations are likely to be much greater under monarchy or aristocracy than under democracy, if the people have reached a stage of civilization that makes the democracy a substantial

fact and not a mere form. The best form of government is a question of the degree of civilization. With a low grade of people a well conditioned monarchy or aristocracy may do far more for order and progress—far more to develop the habits of industry and coöperation on which a higher civilization must be founded—than a democracy which for lack of an intelligent citizenship would be only a cover for the worst forms of individual or class despotism. But when the people have advanced so far as to respond in reasonable degree to the stimulus of democratic institutions and move toward the realization of self-government, justice and the public good will have more chance with a democracy, for justice and the public good are the real interest of the controlling power in a republic. It is true that an enlightened monarch may make justice and the public good his interest and purpose, but such cases are very rare, and history shows that the selfish interests of monarchs and aristocrats have almost always caused intense and grievous deviations from justice and the public good; even if this were not so, no monarchy or aristocracy could have the educative, diffusive and stimulative values of self-government. A democracy is the only form of government in which the interest of the ruling power coincides with the interest

of the public. And as the ruling power tends to use the government to subserve its interest, a real democracy is the only government that can be relied upon to serve the public interest entirely and conform to justice and the public good along the whole line.

Not only is the *interest* of democratic government more in harmony with the public good, but the *knowledge* of what constitutes the public good is likely to be greater in a real republic than in a monarchy or aristocracy.

Collective ability must be employed. One of the most vital factors in law and government is a system which permits free play to what may be called the *collective ability* of the people. When men follow their errors, prejudices, and self-interests, they go apart; when they follow truth and the public good, they come together. Men diverge by error and selfishness, and unite by truth and justice. Their unities are much more likely to be right than their differences. Divergence is an indication of error, convergence is evidence of truth and common good. What a million men vote for, acting freely and independently, is likely to be wiser and better and more reliable than the thought and intent of the average individual, or the unchecked thought and intent of any individual whatever.

Notice carefully the clause "acting freely and independently;" that is the key to the situation. If men do not vote freely and independently, but follow the dictates of some political boss or party machine, they forfeit the benefits of the great principles of convergence on the truth, and the mutual cancellation of errors and prejudices, resulting from the free and harmonious action of a multitude of intelligent persons. The boss or machine is as open to error and self-interest as any individual voter; in fact his dictates are apt to be the concentrated essence of selfishness and error. It is only when the citizens act freely and independently that the great law that men come together on truth and justice, can take effect.

The benefits of a true democracy. True democracy is the flower of the evolution of government. Its benefits briefly stated are as follows:

(1) It means harmony of the ruling interest with justice and the public good.

(2) It cancels private interests and errors against each other and gives effect to the collective wisdom.

(3) It means the equalization or the diffusion of power, which carries with it

(4) The equalization of opportunity; and

(5) The diffusion of benefit—liberty, wealth, education, virtue, etc., also

(6) The fairer diffusion or equalization of the burdens of society.

(7) By placing power and responsibility with the people, democracy protects them from the injustice, oppression and debasement of individual and class rule.

(8) The educative value of self-government is of the utmost importance.

(9) Equality before the law and equality of opportunity stimulate the development of industry, art, science, invention, literature, social progress, civilization.

(10) In every element and relation of life democracy favors liberty, justice, equality, development and the public welfare. It aims at the good of all, not for the benefit or advantage of a few.

III

FIXED LAW IS BUT THE CRYSTALLIZATIONS OF ANCIENT GROWTHS

It is to democracy therefore that we must look for the ideal law; it is to the nearest approaches to democracy that we must go for the highest developments of the law, the closest approximations to and most advanced movements toward a true, well-balanced, thoroughly developed system.

International law. Our law is divided into Internal or Domestic law and International law. International law consists of the rules and principles which through the express or tacit agreement of nations have come to govern their relations with each other. It is to be found in treaties, the usages of nations, opinions of jurists, precedents, and judgments of courts and boards of arbitration.

Domestic law. Internal or Domestic law is that which is created or accepted by our governing authorities to control within our own territory. It is divided into the written and the unwritten law. The written law consists of

constitutions, statutes and ordinances. The unwritten law consists of the common law and equity.

The common law. The common law consists of the principles and usages ascertained and established by the ancient English courts and their modern successors in English speaking countries, as just and proper to be enforced in the cases that have come before them, and are embodied in their decisions which are preserved in the public records and the law reports, and digested by writers of approved authority. The principles of justice and the fair usages of business and society as ascertained by the courts, constitute the substance of the common law; and the recorded decisions are the evidence.

Equity. Equity is the correction of that wherein the law, by reason of its universality or incomplete development, is deficient. Equity has jurisdiction wherever there is a right and no plain, adequate and complete remedy at law. For economy and simplicity the law draws broad lines which do not afford full justice in all cases. Moreover, it presents a case of arrested development or loss of flexibility with age, brought about by the growth of reverence for precedent to a point that checked development and produced a rigidity wholly inconsist-

ent with the original nature and purpose of the common law. Equity is really a second and superior common law, a new growth from the same old root arising above, supplementing and dominating the original growth. It bears somewhat the same relation to the common law that the cerebrum bears to the cerebellum and medulla.

The common law too rigid. In early days in England the King was the source of all law, and the fountain head of judicial power. He appointed deputies or judges in the various divisions of his realm to hear and determine cases as his representatives. These judges heard the evidence, tried to decide according to what seemed just and fair under all the circumstances of each case. As the records of the judicial decisions multiplied subsequent judges recognized the importance of uniformity and stability of the law and finding it easier to follow an old decision than to reason out each case on its own merits, referred to former decisions for light and aid in each new case; after a time they came to regard past decisions as their chief guides, forgetting partially or wholly their independent authority to decide according to the justice of the case. This growing reverence for precedent gave the common law a rigidity that hin-

dered it from adapting itself to the needs of changing times and circumstances. The practice of the Saxon judges crystallized about the two fundamental methods of the common law—the public prosecution of criminal offenses and civil suits for damages for private wrongs. The dominion of precedent held the judges to the beaten path, and complainants from time to time were refused the specific redress they demanded because there was no precedent in a case like theirs. For instance, A refused to fulfill his contract with B, or threatened to cut down an ancient tree most highly prized by B. The common law gave B the right to sue for damages after the tree was destroyed or the contract broken, but B might regard such damages as wholly inadequate relief. Money could not pay him for the loss of the tree that took a century to grow, nor for the breach of contract on the basis of which he had laid his plans for the future development of his business. So some of these complainants, who, through the rule of precedent could get no adequate relief at common law, went to the original source of justice and appealed directly to the King or to the high officials entitled to represent him in the exercise of his supreme judicial power.

In 1067 William the Conqueror appointed the first Lord High Chancellor with special author-

ity to hear and determine such complaints and grant whatever relief he deemed best. Previously the Chancellors of the Exchequer had had jurisdiction in such cases. The Chancellors dealt with the suits that came before them in a broad and liberal spirit. They studied the Roman Law and got new light from the publicists of the Netherlands. They did not confine themselves to the methods of the common law, but granted relief that seemed best calculated to secure the maximum of justice under adequate protection and the special circumstances of each case. For example, instead of leaving B to sue for damages for breach of contract or loss of his valued tree, the Chancellor, in a proper case, would order A to perform his contract and enjoin him from cutting down the ancient tree under penalty of imprisonment if he disobeyed the order of the court. The principles and doctrines supported by the decisions of the Chancellor and his successors constitute Equity.

Equity requires flexibility. In later times the Equity judges manifested the same tendency the law judges did, namely, to forget their high authority to administer justice freely and fully according to the circumstances of each case, and they often refused a remedy where they could not find a precedent in the

past decisions of the Courts of Equity. Nevertheless, there are Equity judges, both in England and America, who still recognize the true nature of the trust reposed in an Equity Court, and will grant relief in a new and proper case according to the principles of justice and common sense, even though they cannot find a specific precedent in the past reports of Equity decisions.

IV

THE LAW IS A LIVE, CHANGING, AND ADJUSTABLE INSTRUMENT

The law "in the breast of the judge" is flexible. In spite of the fact, however, that both common law and Equity have lost the flexibility of youth, and in spite of the rigidity and inadequacy of constitutions and statutes framed by legislators who cannot possibly foresee the circumstances of future cases, the law has much more vitality and adaptability than is generally understood. In fact, the law as a rule really rests in the breast of the judge. Through his power to construe the written law and to select the principles and cases he will follow, the judge can almost always build a legal foundation for the decision he deems right in the case at bar. It is easy to modify the application of statutes by the judicial power of construction; and there are so many principles and precedents running in different directions, that a judge can generally find some principle, precedent or construction to justify in legal form the conclusion he has arrived at on the

facts. The usual judicial process, especially with judges of the higher courts who determine the law, is substantially this: The judge studies carefully the facts of the case in the light of argument, established principles and past decisions, makes up his mind what is fair and just under all the circumstances of the case, and then selects, applies and follows the principles and precedents that will lead to or justify the conclusion he deems right upon the facts. That is the heart of the judicial process as consciously or unconsciously carried on in the minds of the best judges. In discussing this well-known view some time ago with a justice of the United States Supreme Court, I declared my belief that by this method even the courts of last resort arrive at their decisions. He laughed and said I was right. I have at various times made similar statements to three chief justices in leading states and to a number of lesser lights in the judicial world, always with assent to the proposition more or less emphatically pronounced. Such corroboration is very interesting and important, though not essential to the proof, for the reported decisions of our courts bear internal evidence that makes the method luminous.

Over a vast field the effect of the law is determined absolutely by the attitude of the

judge. Suit is brought on a written contract, an insurance policy, for instance, and the defendant claims that one of the clauses of the contract has been broken—a clause forbidding the use of a gasoline engine on the premises. The plaintiff offers oral evidence to show that the insurance agent knew a gasoline engine was used in the building and that it was understood and agreed that this should not affect the insurance. The court may rule for the defendant on the ground that oral evidence cannot be received to contradict or vary the terms of a written contract or the judge may invoke the principle that the rule against parol was intended to prevent fraud and will not be applied where its effect would be to consummate a fraud.[1]

[1] See 13 Wall. 222; 6 Vroom, 360C; 7 Cush. 175; 133 Mass. 82; 135 Mass. 449. In 7 Cush. and 133 Mass. the *original* papers show that only a *soliciting* agent knew the facts on the Co.'s side and that he misstated the facts to the company, as the assured would have seen if he had read the application filled out by the agent. In 7 Cush. there was other insurance and the assured so stated, but the agent made the application state the contrary. In 133 Mass. the assured was sick and so stated, but the agent made the application say she was well. Under such circumstances it would be a fraud on the company to hold for the assured and the policy must be sustained, and this can be accomplished by applying the rule against parol. The case is wholly different where the company itself or the general agent who draws up and issues the policy, knows of the breach of condition,

On the question whether the minds of the parties met in making a contract by mail the judge may rule that the contract was complete if the offeree mailed his acceptance before receiving notice of a revocation by the offerer; or he may follow the rule that the acceptance must be received by the offerer before revocation in order to complete the contract; or he may adopt the principle that the matter depends on the question whether there was a point of time in which the minds of the parties did actually meet. If the acceptance was mailed before the revocation was mailed, there was a time when the minds of the parties met, but if the revocation was mailed before the acceptance there was no time when the minds of the parties came together, the offer being in fact revoked before it was accepted.[2]

Insured buildings in which a widow has the right of dower burned down and the insurance money is paid to the husband's executor. Has the widow lost her dower? The Court may rule that as dower attaches only to real estate

other insurance, assured's interest not the "sole unconditional title," vacancy, gasoline engine, ill health, etc. Then it would be a fraud in the assured to enforce the conditions of the policy and parol must be admitted.

[2] 36 N. Y. 307; 168 Mass. 198, 200; 1 Pick, 278; 9 How. U. S. 390. These cases can be harmonized on the third principle. But see 5 Q. B. D. 346; 5 C. P. D. 344, etc.

the fire has destroyed the widow's right in the buildings, or he may adopt the principle that the insurance money really represents the buildings and will be treated as real estate so far as necessary to protect the rights of those interested in the property.[3]

A owns a horse. B sells the horse as if it were his own. A stands by and witnesses the transaction, without protest or claim of ownership. The Court may hold that no title passed to the purchaser as B had none to give, or it may rule that the horse now belongs to the purchaser on the principle of estoppel. Estoppel is the bar the law puts up to prevent a party from injuring another by setting up the falsity of a belief he has wrongfully caused, or allowed another to entertain and act upon. A allowed the purchaser to act on the belief that the horse belonged to B and he cannot now set up his own title.

Different principles of common law lead to enactment of contradictory statutes. Where paper is deposited in a bank for collection in another city and the bank sends it to a reputable correspondent bank selected with due care, Massachusetts holds that the first bank is not responsible for the negligence of the cor-

[3] See 26 N. Y. 253; 29 Minn. 309; 40 Ch. D. 5; 85 Pa. 208; 18 Conn. 110; 75 Me. 202.

respondent,[4] while New York holds that the first bank is responsible.[5] The ground of the New York rule is that an agent is responsible for his sub-agents, and the ground relied on in Massachusetts is that an agent is not responsible for sub-agents where the principle gives authority to employ such sub-agents and that the deposit of paper for collection at a distance implies authority to employ sub-agents. On broader grounds the weight of reason seems to be with the New York rule, for the first bank is in far better position to prevent loss by fault of correspondents than the ordinary depositor can be. The bank has intimate relations with its correspondents and much better means of judging their reliability and watching their conduct, and holding them to account than the depositor. Moreover, the first bank's knowledge of its correspondents is an intricate matter and the degree of care exercised in its selection a difficult question, and it greatly simplifies and clarifies the transaction to eliminate them and say to the first bank, "unless you make an express agreement to the contrary, you will be held responsible for your corre-

[4] Fabens v. Mercantile Bank, 23 Pick, 330. (See also 1 Cush, 177.)

[5] Allen v. Merchants' Bank, 22 Wend. 215; Ayrault v. Pacific Bank, 47 N. Y. 570.

spondents and can adjust your conduct and charges accordingly."

"Principles of Construction" affect application of written law. When it is a question of constitutional or statutory law, the result will vary according to the principle of construction the Court may deem applicable to the case. An act may be enforced according to its letter, on the ground that the legislators meant just what they said; or according to a modified interpretation based on the idea that the legislature did not contemplate unreasonable consequences; or according to the concrete purpose of those who framed and passed the act, on the ground that the known legislative intent should govern throughout; or according to the underlying reason of the law as it presents itself to the judge, on the ground that the reason of the law is the law. If none of these methods of interpretation produces a conclusion satisfactory to the judge's sense of justice, he may find reason to declare the act unconstitutional, as against either the express provisions of the constitution, state or national, or against the fundamental principles underlying our constitutions and which they were made to enforce. Read the decisions of the United States Supreme Court in the Income Tax Case,[6] the

[6] Pollock v. Farmers' Loan & Tr. Co., 157 U. S. 429; 158 U. S. 601.

Northern Securities Case [7] and other cases in which the several justices wrote separate opinions and note how each judge relies on a different set of principles and precedents as the basis for his conclusion. One judge says an Income Tax is a direct tax,—is clearly such in its nature and effect and is so regarded by economists; and under the provisions of the National Constitution requiring direct taxes to be apportioned among the states in proportion to population, a Federal Income Tax law will be void if the tax is not so apportioned. Another judge holds that the discussions in the Convention that framed the National Constitution and the early decisions under it, show that the term "direct tax" as used in the Constitution was not intended to include an Income Tax. A third judge declares that direct taxes in the meaning of the Constitution cannot include an Income Tax because the consequences of apportioning such a tax in proportion to population would be unjust and absurd, and the framers of the Constitution cannot be supposed to have intended a construction which would produce such consequences under the principle of apportionment according to population, two states of equal population would have to raise an equal amount of

[7] U. S. v. Northern Securities Co., 193 U. S. 197.

Income Tax. Say, for instance, $2,000,000 for each state. But one might be an agricultural state with very few incomes large enough to fall within the field of the tax and a total income of $4,000,000 subject to the tax, while the other might be a wealthy manufacturing and commercial state with many incomes large enough to come within the law and a total of $40,000,000 subjected to the tax. In this latter state those subjected to the tax would pay at rate of 5% on their incomes, while in the former state those subject to the tax would have to pay at a rate ten times greater, or 50% of their yearly income. It cannot be supposed that the words of the Constitution were intended to be used in any sense that would lead to such results. The words "direct taxes" in the Constitution can refer only to such taxes as may be apportioned to population without injustice and oppression.

Judges disagree. In the Northern Securities Case, the majority opinion, or rather the plurality opinion, delivered by Justice Harlan and concurred in by Justices McKenna and Day, declares that the Sherman Anti-trust act makes unlawful all contracts or combinations in restraint of trade among the states, whether the restraint is reasonable or unreasonable. Every agreement aiming at monopoly of any part of

interstate commerce or tending to shut out competition in such commerce is void. The Northern Securities merger did this, and therefore came within the prohibition of the Sherman act. Justice Brewer held that Congress must be presumed to have meant to outlaw only such contracts as are in *unreasonable* restraint of trade, but the Northern Securities, he thought, constituted an unreasonable restraint of interstate commerce and was within his interpretation of the law. Justice Holmes said the statute was a penal act, and could not be held to punish as a crime what had always been lawful, unless such intent is expressed in clear words. He did not expect to hear that Mr. Morgan could be sent to jail for buying the majority of the stock in two or more railroads, and such purchases as an individual may lawfully make, a corporation may be authorized to make.

Final and most far-reaching decisions are disputed. The act says nothing about competition. It covers contracts in restraint of trade, and these limit competition; but a contract may result in limiting competition, as in case of a fusion, and yet not be a contract in restraint of trade. Justice White held that if the Sherman act applied to the acquisition of the stock of two or more railways by an individual or

a company, the enactment was beyond the power of Congress. The power of Congress to regulate interstate commerce does not extend to dictation of the ownership of properties engaged in interstate commerce. Chief Justice Fuller and Justice Peckham also dissented from the majority decision, but filed no separate opinions, though there were still one or two diverse lines of argument open to them. Four for literal construction and enforcement; five against, but one of the five believing a liberal construction still covered the Northern Securities case; judgment went against the company by a vote of five to four.

Different courts apply the law with directly opposite results. Judge Landis of the Federal district court in Illinois on suit of the U. S. Department of Justice, fined the Standard Oil $29,240,000, August 31, 1907, for taking a series of rebates from the Chicago and Alton. But Judge Grosscup and his associates in the Court of Appeals reversed the judgment, July 22, 1908, and remanded the case for another trial, holding that Judge Landis erred in considering each car-load rebate a separate offense and in imposing the maximum fine for the first offense, and that it was unreasonable that the Standard Oil Company of Indiana, with a capital of $1,000,000, should be fined in a sum twen-

ty-nine times as great as its whole capital stock in order to punish the parent company, the Standard Oil Company of New Jersey, which was not cited as a defendant in the case.

Judge Landis cut through all technicalities and went straight to the heart of the case. He found on the testimony of John D. Rockefeller himself and other Standard magnates and officials that the Standard Oil Company of Indiana was only a tool in the hands of the Standard Oil Trust, which really got the rebates, and that during the three years in which the transactions covered by the indictments occurred, the earnings of the Trust amounted to nearly $200,000,000, and that dividends averaging 40% a year were paid during that time. It seems a mere technicality to say that the Oil Trust was not before the Court. If a man could incorporate each of his fingers and toes and one of the fingers was caught in a criminal act and indicted by its corporate name, the man would be the real defendant and substantially before the court though not so in name. That is a fair illustration of the Oil Trust in this case, and the Oil Trust knew it was the real defendant and fought the case with all its might. The case was not fought by the Government, however, against the Oil Trust, but strictly against the Indiana Company, the de-

fendant named in the record. The profits of this company alone were $55,000,000 in eight years, a very large part of which undoubtedly consisted of rebates, and the fine was probably not excessive even as against the Indiana Company alone without regard to its identification as an arm or integral part of the big Oil Trust. The shipments were by the carload, and the railroads allowed a rebate on each car. A bill of lading was made for each car, so the Attorney General of the United States and the President and the Judge naturally regarded the carload as the unit of offense. The doctrine of the Court of Appeals, that each settlement or payment of rebates constituted the unit of offense, leaves it to the shipper and the railroad to decide how many offenses they shall be liable to be prosecuted for and how much they shall be fined. Knowing well that this was not the first offense, but that the Indiana Company and the Standard had been taking rebates in untold numbers from all the big railroads for many years, and were among the most inveterate offenders in the land, he used his discretion to impose the maximum fine. When the case goes up, as we hope it may, it will be interesting to see if the Federal Supreme Court will hold that a company can limit its criminal liability by the amount of its capital stock, or

if a giant trust can escape the penalties of the law by organizing little subsidiary companies to take the rebates from the railroads and pass them up to the controlling corporation. It will also be interesting to note whether the rebates on a trainload constitute but one offense or whether if all the rebates for a year are paid at once, there is only one offense no matter how many thousands, or hundreds of thousands of dollars, may be included in the amount, nor how many items of rebate, as figured by the railroads, are covered by the account.[7a]

The case affords an excellent illustration of the facility with which judges may back up with legal reasoning whatever opinions their mental attitude and feeling may lead them to adopt upon the facts. How great and immediate may be the influence of a judicial decision on industrial affairs, is indicated by the press reports to the effect that when Judge Landis imposed

[7a] On Nov. 16, 1910, over three years after the imposition of the celebrated fine by Judge Landis, Judge John J. McCall of the U. S. Circuit Court, practically set aside the fine by ruling that the settlement of freight charges constituted the offense and not the various freight shipments. This ruling diminished the fine by $29,134,000. He also held tentatively that the "dates in the indictment should correspond to proof tendered," so that although the counsel for the Standard Oil had acknowledged the guilt, the trust stands a good chance to entirely evade every dollar of the fine since the dates in the indictment are dates of shipment rather than dates of settlement. (Ed.)

the big fine, Standard Oil stock went down from $650 to $350, diminishing the Standard's values by hundred of millions; and that the reversal by the Court of Appeals brought the stock up again from $350 to $650 a share. In one hour, it is said, Standard Oil stock rose in value $270,000,000, and altogether it rose, on account of the appeal decision, more than $500,000,000.

The reason and letter of the law may be contradictory. Blackstone says that the reason of the law is the law, and that statutes should be enforced according to their spirit and purpose, or the cause which moved the legislator to enact. "For when this reason ceases, the law itself ought likewise to cease with it." He illustrates the principle as follows: "There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was to

give encouragement to such as should venture their lives to save the vessel, but this is a merit which he could never pretend to who neither staid in the ship upon that account, nor contributed anything to its preservation." As the reason and purpose of the law must be determined by the judge, the rule that a law should be enforced according to its spirit rather than its letter, comes back to the fundamental principle that the interpretation and enforcement of the law are functions of the thought and conscience of the judge. If the question is whether the Sherman Anti-trust law prohibits labor unions, a judge who thinks the spirit and purpose of the law is not to prohibit beneficial combinations, but only those that are unreasonable and injurious in their restraint of trade, and who believes that trade unions do not belong to the latter class, will hold that the law does not forbid the ordinary labor organization; while a judge who thinks trade unions are unreasonable and injurious combinations, or who believes the purpose of the law is to prohibit all combinations in restraint of trade whether reasonable or not, will hold the Sherman law does invalidate trade unions.

A still greater chance for flexibility. Blackstone further says in substance that laws are to be so interpreted as to avoid absurd and un-

just consequences, for legislators are to be presumed not to have intended to produce such consequences. "Therefore," says Blackstone, "the Bolognian law, mentioned by Puffendorf, which enacted that whoever drew blood in the streets should be punished with the utmost severity, was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit." The rule that the judge may interpret the law so as to avoid absurd and unjust consequences, means simply that the judge may so interpret the law as to avoid doing violence to his own ideas of common sense and justice. If the judge thinks it is just and reasonable for a city taking over a water system or street railway to pay not only the value of the property but also to pay for the franchise estimated on the basis of earning capacity *without allowing for the probability that the public may exercise its right to regulate rates or authorize competition,* he will so order; but if he feel it is unjust, unreasonable and absurd to adopt a rule which on a long term or perpetual franchise would lead to valuations equaling the entire present wealth of the city or the state, he will sustain a valuation based on the principle that the state or city may and ought to reduce the earning capacity to a reasonable margin by

exercising the power of regulating rates or authorizing competition.[8]

Courts sometimes annul the reason and purpose of the law. One of the most interesting and instructive illustrations of what the courts can do in the way of molding the law and checkmating the legislature is to be found in the history of trusts and uses. Parliament passed a law, the Statute of Mortmain, forbidding the tying up of estates in perpetuity in the hands of the Church or other corporative bodies. The courts held, however, that if an estate were deeded to A to the use of B, the beneficial right of B, not being an estate but merely an equitable right enforceable in chan-

[8] Long Island Water Supply Co. v. Brooklyn, 80 N. Y. Sup. (73 Hun), 499; 143 N. Y. 596, 600; 166 U. S. 685, 687, 691 (1897). The company franchise had fourteen years more to run and it claimed that it would earn, above all outlay and investment and interest, over $6,000,000 in these remaining fourteen years. But the commissioners cut down the valuation of the franchise and contracts to $200,000 on the principle that it would be the right and duty of the State or of the City, acting under its permission, to prevent such excessive earnings by establishing a public plant or authorizing private competition or exercising the power to regulate rates, and this view was sustained by the Supreme Court and Court of Appeals of New York and the Supreme Court of the United States. The question was not one of statutory law nor was the case fully reasoned out, but the facts afford an excellent illustration of the potency of the principle of rejecting a rule of action or provision of law that would lead to absurd and unreasonable consequences.

cery, would not come within the Statute of Mortmain, so that by deeds in terms of a use or in trust, creating an equitable title in the beneficiary a corporation could still have the whole benefit of an estate in perpetuity substantially as if it held the legal estate. Under this ruling it was easy to evade the Statute of Mortmain and break through the barrier of the federal system, transferring the right to real estate with much more freedom than had been formerly possible. To prevent this Parliament passed the Statutes of Uses executing the use in the beneficiary so that he should have the legal estate in like manner and degree as he had the use. This brought the case again within the Statute of Mortmain. But the lawyers simply added a few words to the vital clauses in their deeds of trusts. Instead of deeding an estate to A to the use of B, they deeded to A to the use of B to the use of C. And the courts held that the statute executed the first use but not the second, so that the legal estate went to B, while C would still have the beneficial right enforceable in equity free from the Statutes and Uses of Mortmain.

Courts may declare law void on certain grounds. Not only can courts side-track a statute when occasion requires, but they can often nullify a law by declaring it void either

on constitutional grounds or on broad principles of justice existing independently of constitutional provisions. For example a legislature cannot take private property or tax the people for a private purpose, but only for a public purpose.[9] If a legislature seeks to take the property of A in order to give it to B, or taxes A, B, C, etc., in order to give the money to a private manufacturer or merchant, our courts have held that such an act is void as beyond the scope of legislative power.[10] It is not a legislative act at all, but an act of usurpation.

It makes no difference whether the constitution says anything about it or not. The provisions of the constitution are not the only limitations on legislative power. There are others that inhere in the very substance of republican institutions, underlying the constitution as essential to the very purposes for which the constitutions exist, and therefore impliedly recognized by the creation and maintenance of said constitutions.[11] The cases cited and many others declare that legislative power is limited

[9] U. S. Supreme Court, 20 Wall. at 664, U. S., 487; 58 Me. 590; 2 Dill. 353. (Cooley on Taxation, p. 116, and cases cited.)

[10] Judge Dillon in 27 Ia. 51, and 58 Me. 590. (See also 20 Mich. 487.)

[11] The U. S. Supreme Court in 20 Wall. (See also Judge Dillon in 27 Ia. 51; 25 Ia. 540; and 39 Pa. St. 73.)

by the great principles of justice for the enforcement of which government is instituted, that acts in violation of these principles will be held void by the courts, although no provision of the constitution can be found to condemn them.

Court prevents legislature from permitting cities to sell coal. On the question whether the legislature can authorize cities to establish municipal fuel yards to sell coal and wood at reasonable prices, the majority of the Massachusetts Supreme Court [12] stated the opinion that the legislature could not give such authority because the buying and selling of fuel is not a public purpose, the ground of decision being that buying and selling coal did not differ from buying and selling other commodities in general, and the judges thought it would be bad policy to open the door for municipalities to go into mercantile business. If they could sell wood and coal, why not dry goods, groceries, hats and caps, boots and shoes, and everything else. To hold this a public purpose would be to open the way to Socialism and destroy the distinction between public and private purpose —anything the public chose to undertake would be a public purpose. In a strong dissenting opinion Justice Oliver Wendell Holmes, now a

[12] Opinion of Justices, 155 Mass. 601.

Justice of the Supreme Court of the United States, used these words:

Justice Holmes's dissenting opinion. "I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is not less public when that article is wool or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers, or the taking of land for railroads or public markets." In 150 Mass. 592, the Supreme Court held that the legislature could grant municipalities the right to make and sell gas and electricity, on the ground of the *general convenience* of the service, the *impracticability* of each individual's rendering the service for himself, and the *necessity of using the streets* in a special way, or exercising the *right of eminent domain;* whereas the buying and selling of coal and wood does not require special use of the streets, nor the right of eminent domain, nor the exercise of any other franchise or authority derived from the legislature. In dealing with sewers, water, gas and electric works, etc., courts have sought to strengthen their conclusions by reference to the necessity of a special use of the streets, or other action requiring legislative authority; but they did not decide that a purpose could

not be a public one without this element; on the contrary, schools, libraries, museums, lodging houses, hospitals, baths, scales, markets, etc., do not require any special use of the streets nor any franchise or rights of eminent domain, but can be established by any one without legislative authority. As to impracticability, it is as impracticable for each individual to establish a coal yard, and get coal from the mines at reasonable rates, as it would be for each individual to supply himself with schools, libraries, baths, hay-scales, etc.

In New Zealand there are not only public coal yards, but public coal mines also, owned and operated by and for the people.

Personal attitude of judges has great significance. The prejudice of a judge against anything that looks like Socialism may govern his interpretation of the law and limit the powers of municipalities and the legislature; while the favorable attitude of other judges toward public activities will give the law the color of their more liberal thought, broaden the meaning of "public purpose," and widen the scope of municipal and legislative authority. Truly the personnel of the judiciary is of incalculable importance; the very heart of the problem of government; the key to justice, liberty, progress, and civilization. The make-

up of the United States Supreme Court and the courts of last resort in the various states, is of vastly greater moment than the character of Congress or legislature, Governor or President, vital as the influence of all these civic factors undoubtedly is.

Courts more powerful than legislatures. Illustrations of the point we are considering could be multiplied indefinitely, but one more of special interest will be sufficient here.

It relates to the limitation of legislative authority by principles recognized by the courts as fundamental principles of justice inherent in a system of free government though not stated or enforced by any provision of the constitution. In People v. Hurlbur [13] for instance, Chief Justice Campbell and Justices Cooley and Christiancy held that the legislature could not appoint a board of public works to control the public buildings, pavements, sewers, water works, engine houses, etc., in the city of Detroit although no express provision of the constitution negatived the act. The court held that there is a clear distinction between "what concerns the state and that which does not concern more than one locality." The people of a city or town have a right to the management of their local concerns and the

[13] 24 Mich. 44 (1871).

selection of their local officers who are to control such concerns, and this right cannot be taken from them by the legislature, for it rests upon the principle of self-government, which is inherent in free institutions, and underlies the constitution as the purpose for which the constitution was established. Chief Justice Campbell distinguishes (People v. Mahaney, 15 Mich. 492,) where the validity of an act establishing state control of city police is sustained, saying the question was "whether the police board is a state or municipal agency," and added, "I think it is clearly an agency of the state government. . . . There is a clear distinction in principle between what concerns the state and that which does not concern more than one locality. . . . There is no dispute concerning the character of the public works act. Its purposes are directly and evidently local and municipal."

In Board of Park Commissioners v. Detroit,[14] where the legislature appointed state officers to buy land and improve it for a park for, and at the expense of, the city of Detroit, Judge Cooley said: "We affirm that the city of Detroit has the right to decide for itself upon the purchase of a public park. It is as easy to justify, on principle, a law which permits

[14] 28 Mich. 228 (1873).

the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish, a park or boulevard for the recreation and enjoyment of its citizens."

Two views of judicial control over legislation. In State v. Denny,[15] an act creating a board of public works to be appointed by the legislature, and to have control over streets, alleys, sewers, water works and lights, was held invalid as infringing the right of local self-government inherent in municipal corporations under our system of free institutions. The right of local self-government antedated the constitution and was not surrendered by it. Judge Coffey, citing Cooley on Constitutional Limitations, 5th ed., page 208, says:

"It does not follow that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded. . . . The constitution must be con-

[15] 118 Ind. 382 (1888).

sidered in the light of the local and state governments existing at the time of its adoption. . . . The principles of local self-government constitute a prominent feature in both the federal and state governments. . . . It existed before the creation of any of our constitutions, national or state, and all of them must be deemed to have been formed in reference to it, whether expressly recognized in them or not."

For the contrary view enforced in some other states take this statement from the Massachusetts Supreme Court. "It is suggested, though not much insisted on, that the statute of 1885, c. 323, is unconstitutional, because it takes from the city the power of self-government in matters of internal policy. We find no provision in the constitution with which it conflicts, and we cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the constitution.[16] "

The law under consideration in this case established a state police for Boston, and so was not within the limits of Michigan and Indiana

[16] 148 Mass. 375, at 383–6.

decisions, but the reason covered the whole field, and is often referred to as authority against the Michigan doctrine.

A precedent for almost anything and a way to set aside almost any precedent. It is true that it is not *always* possible to frame a legal argument for the decision the judge regards as just and right on the facts of the case at hand. For the sake of stability in the law, and the protection of rights that have grown up under former decisions, a judge may feel constrained to follow a precedent which he does not regard as wholly just and would not have agreed to if he had been on the bench that made the ruling in the leading or governing case. But this is not the usual situation. A good judge is always exceedingly averse to putting himself on record with a decision he deems unjust upon the facts and he will not do so if he can reasonably avoid it, as he generally can. With the courts of forty-six states and several English speaking jurisdictions handing down decisions at the rate of several hundred bulky volumes every year, it is not difficult to find authority and reason for almost any practicable view; and even when certain precedents seem to stand in the way of the judgment the court would like to render, these can often be distinguished from the case at bar by some slight difference, or perhaps

quite marked and vital difference in the facts and circumstances. The multiplicity of principles and precedents enables the judge of ability and vigor to make his conceptions of justice and the formal law go hand in hand by the due selection and emphasis of the appropriate legal principles and precedents; and if need be the judge can directly overrule a precedent that stands in the way of justice as he sees it.

V.

FUNDAMENTAL RIGHTS AND RESPONSIBILITIES AS DEFINED BY THE LAW ARE BASED UPON REASON AND THE NATURE OF THINGS.

Both the written and unwritten law deals with rights and wrongs. Rights are divided into rights of persons and rights of things, or more accurately speaking into right of persons in their general relations to each other, and the rights of persons in their relations to property. The general rights of persons fall into two divisions, primary and secondary. The primary general rights consist of those fundamental personal rights that lie at the basis of the whole social structure.

Primary general rights of persons. (1) *Security.* The right of life, limb, health, reputation, reasonable comfort and peace of mind. The right to personal safety against bodily aggression of every form is so carefully guarded by the law that the slightest impact upon or contact with the person of another is actionable unless such impact or contact is by permission expressly implied or clearly justified as incident

to the exercise of a legal right or in the execution of the law. Suit may be brought for an unpermitted kiss, or blowing one's breath in another's face, or jostling a person or thing against him, or kicking the horse attached to the wagon in which he is sitting so that his person is jarred, even the attempt at wrongful impact on the person of another is prohibited and punished by the law, and this whether the danger be real or only apparent (as in case of the threatening use of an unloaded pistol) if the person is within reach of the method of attack resorted to.

(2) *Liberty.* The right to free locomotion, free speech, freedom of the press, and freedom of action in every particular so long as the rights of others are not infringed. Even the rights of free locomotion and of free speech are not without bounds but are subject to such limitations as are necessary to safe-guard the rights of others—the man has no right to trespass on his neighbor's land or rob him of his reputation by slander or libel.

(3) *Equality.* The right to equality before the law, equal opportunity and impartial treatment so far as concerns the action and influence of law and government or of public or quasi-public agencies created and controlled by them or of any agencies performing public or

quasi-public functions. Unjust legislation in A's private interest, a false judgment in his behalf obtained by fraud or money or personal favor, and an advantage over rival shippers by means of railroad rebates, are all violations of the fundamental right of equality.

(4) *Contract.* The right to make agreements and coöperate with others for any purpose that is not contrary to the public good.

(5) *Property.* The right to create, acquire, hold, use, and dispose of property according to all the methods recognized by law.

(6) *Justice.* Equality of benefit to service rendered; equality of burden to benefit received; due encouragement of beneficial conduct and promise, and due repression of detrimental conduct and promise, diffusion and equalization of accidents, burdens and benefits so far as they are independent of the conduct of the persons affected. The ideal of justice is that every man should receive the natural consequences of his own conduct but should not be either burdened or benefited beyond his fellows by conditions for which he is not responsible. Justice consists of the series of equalities that results from the due appointment of those elements of life that depend on individual conduct such as wealth, position, reputation, power, punishment, etc., and the due

diffusion of those elements that are more or less independent of individual conduct, such as distance, climate, accidents, social forces, the accumulated knowledge of the past and all the benefits and burdens bequeathed by former generations to the present.

The principle of proportionality. The principle of proportion is the essence of justice in the encouragement of good and the repression of evil. One whose conduct is very beneficial to society should receive a greater reward than one whose life is only slightly beneficial, in order to maintain the due equivalence between the degree of encouragement and the beneficial quality of conduct,—if this is not done the social pressure pushing men to live the life of higher usefulness is lost. One whose conduct is very detrimental to society should be subjected to a greater degree of repression than one whose conduct is only slightly detrimental, in order to maintain the equivalence between repression and wrong-doing, otherwise there is no object to the wrong-doer to limit or suppress his evil tendencies. A man who makes a great invention or renders a great public service should receive a larger reward in wealth, social consideration, etc., than one whose life is of little or no benefit to the community; and one who commits murder should receive a greater

punishment than one who steals a loaf of bread. This right to justice involves all the preceding rights and more.

There is nothing absolute about any of these rights, not even the rights to security, liberty and justice. A man may forfeit the right to liberty by wrong-doing, or it may be modified and limited to any extent that may be necessary for the public good. A man's person may be taken by the law for the public defense or to aid in the administration of justice. Even justice itself may be departed from and some wrong done to individual citizens for the sake of a larger public good as where innocent persons are compelled to appear as witnesses or jurymen in criminal cases often to their serious inconvenience and injury.

Secondary rights of persons. The secondary general rights of persons are:

(1) *Protection.* The right to the full protection of law and government in the enjoyment of all rights free from aggression of every kind, direct or indirect.

(2) *Redress.* The right to adequate and speedy redress for all wrongs within the recognition of the law.

(3) *Fair trial.* The right to a fair trial before an impartial tribunal without unreasonable delay or expense.

(4) *Self-defense, etc.* In case of burglary, robbery, assault and battery and other cases of emergency, when there is no time or opportunity to secure protection from the public authorities, or the protection of the law proves inadequate, the citizen may defend himself, his family and his property with all the force that is reasonably necessary under the circumstances; and he may also in such emergency cases, defend the persons and property of others from aggression.

Special rights of persons. The special rights of persons are those growing out of particular relationships, public and private, such as the relations of Governors, Legislators, Mayors, Councilmen, Judges, Police, etc., with each other and with the people, the relations of persons as aliens or natives, and their relations as husband and wife, parent and child, guardian and ward, teacher and pupil, master and servant, principal and agent, etc. These rights and others mentioned below will be dealt with later in the book as far as necessary to our purpose.

Rights of artificial persons. So far we have been dealing with the rights of natural persons. The rights of artificial persons or corporations public and private, depend on their charters, the statutes which control them and such constitutional provisions as may apply to them.

Rights of things. The rights of things consist in dominion over real estate and personal property. This department of the law treats of estates and interests in property, and the methods by which such interests may be gained or lost by act of the parties or by act of law.

Public and private wrongs. Wrongs are divided into public wrongs and private wrongs. Public wrongs or crimes and misdemeanors are wrongs of so serious a character to society that the law attaches a penalty to them in addition to whatever redress the persons especially injured may seek to obtain; such wrongs will be prosecuted and punished by public authorities acting on behalf of the state.

Private wrongs are of two classes: (1) Breaches of Contract, and (2) Torts or violations of right existing independently of contract, and including all private wrongs other than the mere breach of contract. The same act may be a tort and also a breach of contract, as in case of a breach of warranty; but if the act is wrong only because it breaks a contract—if it is not a violation of any right existing independently of contract as in case of A's refusal to construct a house he had agreed to build for B—the act is not a tort but only a breach of contract. The same act may also be a crime as

well as a tort, as in case of seduction, libel, nuisance, assault and battery, etc.

Civil and criminal law. A division of the law should be mentioned in this connection which runs across the line that separates the written from the unwritten law—the division into criminal law and civil law. The criminal law deals with public wrongs, and its objects are: (1) Retribution (2) Prevention (3) Reformation.

The principal business of the civil law in this relation is the redress of private wrongs—the redistribution of loss caused by detrimental conduct so that the loss resting upon innocent or comparatively innocent persons by reason of such conduct may be transferred to the guilty parties.

Redress of private wrongs.—Contributory negligence. If both parties are in fault in substantially equal degree in relation to the loss, the law will not intervene but will let the loss rest where it has fallen. To use the machinery of the law to transfer loss from one party in fault to another party equally in fault, would not seem wise or just to the community. To have a loss fall on the wrong-doer A would do no more for the repression of evil than to have the loss fall on the equal wrong-doer B, and

public moneys, the time of courts and public officers, etc., would be expended for nothing. This is the philosophic basis of the principles in *pari delictu,* and contributory negligence. It might be agreed that when both parties are at fault the loss should be divided between them. For instance, if a railroad train is thrown from the track by a negligent misplacement of a switch, and a passenger standing on the platform of a car in violation of the company's rules and the plain dictates of ordinary prudence, has his leg broken and suffers a loss of $10,000 in time and costs, it might seem fair that the company should bear half the loss at least. The doctrine of contributory negligence is used however to compel the loss to remain in entirety where it has fallen.

Plaintiff must have "clean hands." It is a rule of equity that the petitioner must come into court with clean hands. The plaintiff must come before the bar of justice substantially free from fault in relation to the loss or injury complained of. Where, however, one party is much more in fault than the other and the loss has fallen on the latter, the law will intervene to put the loss on the person most in fault. As if a near-sighted man walking without his glasses falls into a coal hole negligently left open in the pavement, or is struck

while crossing the street by a carelessly driven automobile, the fact that he left his glasses at home would not prevent his recovery.

The grounds of liability. The grounds of liability, or foundations on which suits for damages may be brought in tort and contract, are causation, contract, control and benefit of the service, and best position to prevent the loss. Causation of the loss or injury may be by willful wrong, negligent wrong or insane wrong. An insane person cannot be held responsible in the sense that underlies the efforts of the law to mold human conduct through the trans-intellectual effects of punishment or redress; but the property of an insane person may be held for his torts on the principle that where a loss must fall on one of two equally innocent persons, it must be borne by the one who caused it or was in the better position to prevent it.

Expressed contracts. Liability on express contract rests upon the ground that stability, certainty and provision, and in fact the whole network of business and social interests, require that men should be able to rely on the definite, well-considered promises of their fellows. Modern business is built on that foundation. Some have expressed the belief that agreements would be fulfilled as well or better without legal sanction. They say that if the

matter were left to honor no one who broke his promise would be trusted the second time so that the motive to fulfillment of agreement would be stronger than at present. It is clear, however, that in our complex civilization where men are constantly moving about from state to state and business relations extend from ocean to ocean and from continent to continent, it would be a serious handicap if the sole reliance had to be placed on personal honor. The business world already carefully attends to the question of honor and scrutinizes a man's record as thoroughly as possible before trusting him, but it nevertheless needs very much, and values very highly the additional safeguards of the law, especially the right to proceed against the property of those who fail to fulfill their contracts. The history of traffic agreements among railroad managers in the United States shows that even men of the highest rank in the business world would come together time after time and make agreements of honor and then go right out and secretly break those agreements because there was no legal sanction to hold them and their railroads liable for the breach. A reference to the marriage contract will make the effect of an absence of legal sanction equally clear, for one can easily imagine the facility of annulment that would re-

sult if the binding force of the marriage contract rested solely upon honor in the present stage of human development.

Implied contracts. Implied contracts rest upon fair inference from the words and conduct of the parties, or upon a legal friction or presumption of an agreement to fulfill some duty or obligation recognized by the law; as the duty of rendering an equivalent for benefit received or accepted under circumstances showing it was not intended as a gratuity. If a man goes into a restaurant, orders a dinner and eats it, the law implies a promise to pay for it, unless he came as the guest and at the invitation of the proprietor. So if a railroad newsboy distributes boxes of candy among the passengers, calling "Huyler's chocolates, 30 cents a box" and a passenger opens a box and begins to eat the contents, the law will imply a promise to pay.

Control. Control is the principle that underlies the liability of a master for the conduct of a servant in his employ. The master should bear the losses incident to activities carried on for his benefit and under his direction and control. A master or employer is responsible for the acts of his servant or employé when those acts are done by his direction or authority, with his assent or ratified by him, where they involve

a breach of the employer's contract, or are done within the scope of the business for which the servant was employed. If the servant goes outside of the master's business to accomplish a purpose of his own the employer is not liable. But if the servant is acting within the sphere of activity in which the employer put him, the latter is responsible. The master has given the servant the opportunity and power, the service is carried on for the master's benefit, therefore the master must be responsible. So far as the acts of the servant result from or are made possible by his employment, are involved in or are incidental to the service, are performed while carrying on this service, or while acting in general furtherance of the master's business, the master is liable.

A defined realm of responsibility. If the driver of M's team leaves it in the street and goes into a saloon to get a drink and while there falls into a quarrel and commits assault and battery, his employer is not liable, for the servant has gone outside the master's business to accomplish a purpose of his own. But if while driving M's team the servant runs over a boy or strikes him with his whip, or collides with another vehicle either negligently or on purpose, the master is liable, for the injury was done while the employé was acting in the employer's

business. It is sometimes said that the particular act must be in specific furtherance of the master's business or he will not be liable. But this is not true; it is sufficient if the servant is acting at the time in the general furtherance of the employer's business. If an engineer loses his hat in a gust of wind, and to get it runs his engine back so negligently as to smash into a passenger car and injure one or more of the occupants, the company is clearly liable although the particular act was for the engineer's own purpose and not his specific furtherance of the company's business. So if a conductor uses his authority to annoy a personal enemy on the train, or kicks off a boy who incurs his anger, or kisses a woman passenger against her will, these acts are for his own purposes and not in furtherance of the company's business nor within the conductor's authority, yet the company is clearly liable because the conductor is acting at the time in the sphere of activity for which he is employed; his acts are incident to and rendered possible by the opportunities and powers conferred upon him by the company. The company selected the conductor, put him in charge of the train and must stand the consequences. It gets the benefits of the service and must bear the losses incident to or arising from it.

The servant himself is also liable, of course, directly to the injured party. And the master who has to pay for the fault of the servant has an action over against him for reimbursement.

The fellow servant doctrine. The old rule of the common law that an employé could not recover from the master for damages resulting from the negligence of a fellow servant, was based on the idea that the negligence of fellow servants was one of the ordinary risks of employment which the employé took upon himself when he engaged in the business. But the rule is now quite generally modified by statute, and it is quite clear that the employer stands in far better position than the worker to prevent injury either by defective machinery or negligence of the company's employés. The master or his agents select the employés, the business is carried on under his direction and control and for his benefit, and he must bear the resulting losses among which are injuries to employés who are themselves innocent of fault.

Legal and moral responsibility not coterminous. Legal liability is generally accompanied by blameworthiness but this is not always true. Legal responsibility and moral responsibility coexist throughout a large part of their territory, but are not coterminous at either end. One may be exceedingly blameworthy without

incurring legal liability, as where a man out of spite and malice builds a high wall on the edge of his land on purpose to shut off his neighbor's light, air and view. And on the other hand legal liability may exist where there is no blame. A man may be liable on his contract even though it be impossible for him to fulfill it, as if his property is swept away by fire or flood, cyclone or panic, so that he cannot make payment at the time agreed, he is nevertheless liable on his note. Even if he becomes himself a physical and mental wreck so that payment is permanently impossible, he is still liable.

Where the impossibility attaches to an act of a specific nature, it may excuse performance; as if an opera singer falls ill, or an artist who has agreed to paint a picture loses his arms, or a horse that is to be delivered on a given day dies the day before that time without fault of the vendor, performance is excused. But the fact that impossibility is not always an excuse shows how far beyond the line of blame legal responsibility may be carried. A master, as we have seen is legally responsible for torts committed by his servant while acting within the sphere of his employment, although he may have selected the servant with the utmost care, and expressly prohibited the acts complained of; and too when no blame either of intent or negli-

gence is imputable to the servant. It is enough that the business is carried on under the master's control and for his benefit to make him responsible for the injuries resulting from it to innocent third persons.

Act may be morally right yet criminal. Even criminal liability may exist where no moral blame attaches. The owner of a building may be liable for a nuisance established on his premises such as a liquor or gambling den or brothel, although he selected his tenant with due care, expressly stipulated against any such use of the property and personally inspected the premises every few months. So it is no excuse of bigamy that a woman honestly believed her husband to be dead. So no moral blame attaches necessarily to the running of an automobile more than twenty or thirty miles an hour; or to the wearing of clothes appropriate to the other sex; but these are both sufficient causes for arrest and criminal prosecution.

One of the most interesting points in the comparative anatomy of legal and moral responsibility is the fact that a person may be legally liable not only without blame but in consequence of conduct of the highest beneficence. For example, one who quietly puts a hopeless sufferer from incurable disease out of his misery may be doing an act of the greatest kindness but he

would nevertheless be criminally liable on the charge of murder. The law cannot trust the question of life and death to individual discretion. Such a rule would open the door to fraud and greatly diminish the security of human life. It is quite possible that in the future such discretion may be given to a competent commission of experts but it can never be intrusted to individual judgment.

The basis of criminal liability. Criminal liability at common law requires a free voluntary act or omission on the part of one possessing intellectual capacity sufficient to understand the nature and consequences of the act, and having knowledge of circumstances from which a man of ordinary prudence and intelligence would foresee that the act or omission might be dangerous or injurious. But under statutory provisions criminal liability may be broadened so that a man must find out at his peril those facts which may bring his conduct into conflict with the law. The full statement of the ground of criminal liability, therefore, must be as follows:—a free voluntary act or omission on the part of one who has sufficient mental capacity to understand the nature and consequences of the act and who knows or ought to have known of circumstances from which a man of ordinary prudence and intelli-

gence would foresee the act or omission might be injurious.

A free act. There must be a free voluntary act. Inability to refrain from the act is a defense. Punishment can have no preventive effect on any other basis than that the fear of it acts upon the intelligence being capable of refraining from the prohibited conduct. If the defendant acted under compulsion, as of an armed force or because of necessity to escape irreparable injury, there is no criminal liability, also if he acted under irresistible impulse as in case of delirium tremens. The irresistible impulse or overwhelming passion of a sane man is no excuse. But irresistible impulse resulting from disease which destroys the will destroys criminal liability. Temporary insanity induced by intoxicants or drunkenness voluntarily incurred is held to be no excuse, but the real insanity of delirium tremens which overturns the will completely is a defense. If the act is done in sleep or hypnotism or under the influence of opium there is no criminal liability unless the condition referred to was induced with a view to the commission of the crime. Wherever an "act of God" intervenes or accident is the real cause of the injury no criminal liability exists.

A sound mind. There must be mental ca-

pacity sufficient to understand the nature and consequence of the act. An infant under seven years of age is presumed incapable of criminal intent. And if there is a mental delusion as to the act, insanity, or mental incapacity for understanding the nature and consequences of the act there will be no criminal liability. Moral delusion as to the nature of the act, however, is no excuse. An anarchist, for instance, may fully believe he is performing a virtuous action when he throws a bomb at a king or industrial aristocrat, but if he understands intellectually the nature and consequences of his act, viz., that it may cause explosion and death, it is a crime no matter what his individual opinion as to morality of his act may be.

Foresight not essential to liability. It is not necessary even at common law that the individual should foresee the danger of injury resulting from his conduct. It is enough if the circumstances known to him at the time would have led a man of ordinary prudence and intelligence to foresee the danger from the act. The test of foresight is the average man, and the defective prevision of the individual actor is no defense unless his mental incapacity is so great as to put him in one of the excepted classes, infancy, insanity, etc. For example, a workman removing the walls of a building that

is being torn down may not actually foresee danger to passersby from the methods he adopts, but if the man of ordinary prudence and intelligence would have foreseen such danger he will be criminally liable and may be indicted for manslaughter, if a person passing below is killed by the falling of the wall in consequence of his imperfect methods.

Omissions are indictable. Omissions may be indictable as well as positive acts, for example, the omission of a person cognizant of crime to notify the government that a felony has been committed. So also is the neglect of a switch tender to turn the switch at the proper time, or of a train dispatcher to send a telegram, or of a physician to attend a patient, or of a proprietor, contractor, or workman to cover a dangerous ditch or well or properly safeguard any dangerous agency.

Basis of liability for tort. Liability for tort generally involves as matter of fact the same three elements as criminal liability. But the essential elements are simply (1) an act on the part of the defendant which forms a link in the chain of causes leading up to and producing the injury; (2) notice actual or constructive of circumstances from which a man of average prudence and intelligence would foresee that the act might be injurious.

No free voluntary act is necessary. A man may be liable for a tort committed under compulsion or necessity. If armed men compel A to take B's horse A is not criminally liable but he is liable in tort. He takes B's horse to save himself but must pay for the conversion.

Intellectual capacity to understand the nature of the act is not essential. A man may be liable as we have seen for his insane tort, as between two innocent parties he who causes the loss must bear it.

There must be knowledge of circumstances from which the average man would foresee danger. A man is bound at his peril to keep his cattle in, for it is well known that if his cattle stray into his neighbor's fields they are likely to injure crops and garden; but he is not bound to confine his dog unless he has actual notice of a propensity to do harm on the part of the particular animal, for dogs are not usually dangerous or harmful. If A exercises dominion over the property of another thinking it is his own, he is nevertheless liable in tort although he may not be blameworthy and has no actual notice of the facts that make his conduct wrongful. He is bound at his peril to be sure the property is his own. So if an auctioneer sells goods that have been sent to his rooms by mistake he may have to pay for the

goods although he has no way to reimburse himself. If a clerk in a book store sells a libelous book the owner of the store is liable, under the broad rule already discussed that an employer is responsible for the torts of his employé committed while acting in the master's business. In such cases there is no moral blame or fault of any kind nor even knowledge of the specific circumstance that renders the act injurious but only a general knowledge that injury may result.

The key to legal liability. It is a rule of public policy that as between two innocent parties the one within whose sphere of activity or business the loss occurs and who is in the best position to prevent the loss, shall be held responsible for it. In some cases the law will even put a loss on one who has not even so close a relationship as that of employer to the wrong-doer. For example, A's vessel may be held to pay for a negligent collision although the ship was in the hands of an independent lessee. Here we have only the general knowledge on the part of A that the ship he owns and leases may cause injury by collision, etc. If B were to hire A's carriage or automobile and negligently collide with another vehicle, A's carriage could not be held for the damages. But in case of a ship in foreign waters it may

be difficult for the injured party to enforce his claim against anything but the ship. So the vessel is held and the foreign owner is left to recover from the lessee as best he can. The owner could not be held personally liable in such a case but his property is held because that is the best and surest method of securing fair redress, such liability being one of the risks the owner knows he must take when he leases the ship. At bottom legal liability is a question of what is reasonably expedient under all circumstances of the case,—public policy is the root of the tree.

The formal liabilities have changed. Both criminal liability and liability for tort had their origin in vengeance—the impulse to destroy what hurts us and so prevent future harm.[1] In early times the dog, or horse, or slave that caused an injury must be delivered up to the injured party to be put to death. In "Exodus" the ox was to be stoned. In Athens the ox was to be banished. The wagon that caused damage was to be burned at the stake. In later times the owner of the ox, or cart, or slave was allowed to make a money payment instead of delivering up the guilty person, animal, or thing. Here we have the ribs of the

[1] See *"Ancient Law,"* by SIR HENRY MAINE, and *"The Common Law,"* by OLIVER WENDELL HOLMES.

common law—punishment for wrong-doing and payment of damages for injury.

The liabilities of the law to-day are on a much higher plane than they were some hundred years ago. Our criminal law aims directly and consciously at prevention, adjusts the punishment to the degree of guilt and strives to reform the criminal with ever-increasing care and wisdom; our civil law with a good degree of consistency aims to throw the loss arising in any transaction upon the one who has in the course of actions producing the loss, manifested in greater degree those qualities which should be eliminated.

And may change again. It may be that in the future the philosophy of legal liability may be greatly simplified and clarified by distinguishing between liability as a wrong-doer, and liability as insurer on a contract implied by law upon the circumstances of the case. A master, for instance, who is held for damage done by his servant without fault or negligence on the part of the employer himself, is not really held in tort but in contract. He is not a wrong-doer, is not guilty of tort himself, but is held for the tort of another on a contract implied by the law that in consideration of carrying on his business in the community and engaging employés to do the work, he will guar-

antee the public against loss or injury resulting from such employment and such business carried on for his benefit. That appears to be true ground of liability in such cases and it would be well if the formal liabilities of the law could be put in each case upon their true foundations in reason and fact, instead of being left to rest upon fiction or wrongly classed with liabilities of a wholly different nature and foundation.

Only proximate consequences considered in recovering damages. In estimating damages the law looks only to the proximate consequences, that is to the direct and immediate consequences of the act, omission or event that formed the basis of suit, and does not take into account the indirect, remote, or secondary consequences except where liability for such consequences is clearly contemplated and provided for by contract. For example, if B destroys my books, and the loss of my library makes me ill so that I lose time and money, have to pay doctors' bills and cancel a valuable engagement to deliver a series of lectures, the law will give me only the fair value of the books destroyed: I cannot recover for the secondary losses incident to the sickness brought on by the destruction of my literary possessions. So if B blows up my store I can only recover the

value of the building and its contents, or the difference in their value before and after the wrongful act, in case they are not wholly destroyed. I cannot recover for the loss of custom nor the wages paid my permanent employés during the time the store is being rebuilt and newly stocked. A man is not held to contemplate the indirect or secondary consequences of his acts but only the natural, direct, and immediate consequences. It is the rule of the average man once more. The law requires only common prudence and ordinary foresight. In contract cases the same rule holds. I have a fire insurance on my store; if loss occurs within the terms of the policy I can recover for the damage to the property by fire and smoke and also for damage caused by water used to extinguish the fire, for these are the natural and proximate consequences of the fire, but I cannot recover for the salaries of employés engaged by the year or for the loss of trade during the period of reconstruction, unless the policy expressly covers such secondary losses. The law will not presume that indirect, remote and secondary consequences were within the contemplation of the parties unless they have made this clearly manifest.

VI

THE FUNCTIONS AND OBJECTS OF THE LAW CONTEMPLATE A MUCH LARGER SCOPE OF USEFULNESS THAN GOVERNMENTS AS YET PERFORM

In its comprehensive business of repressing evil and developing good, the law has various special functions and specific objects which may be stated as follows:

FUNCTIONS OF THE LAW	SPECIFIC OBJECTS
Restraint—Prohibition and compulsion.	To establish justice, order, economy and facility.
Protection.	To insure domestic tranquillity.
Relief.	To provide for the common defense.
Regulation.	To secure the blessings of liberty.
Development.	To promote the general welfare.
Service.	

Incident to all these and in a sense at basis of them all, are laws providing for taxation, by means of which the necessary funds are raised to establish and maintain armies and

navies, police, courts, prisons, schools, public parks, legislatures and all the machinery of the law.

Service. Laws providing for schools, libraries, parks, fire service, public water supply, etc., are laws of service.

Development. Laws providing public scholarships and prizes for good work in school or any special inducements for the cultivation of ability, premiums for the best varieties of stock or agricultural or manufactured products, appropriations for expositions to stimulate industry, tariffs to protect and develop production, reasonable rights and privileges granted to private parties who will undertake to open mines and build railways, farms and factories —all these are laws of development aimed at the positive production of good, not by the direct performance of the service through public agencies, but by the encouragement of effective private activities in the desired directions.

Regulation. Laws providing forms for contracts, wills, corporate acts, procedure in court, requiring vehicles to go to the right in passing, prescribing the conditions of entering on the practice of medicine, law, pilotage, etc., etc., are regulative measures intended to secure order, economy, safety, and the facilitation of business.

Methods of relief. Relief is given by two broad methods that we have already seen: (1) Suits for damages at law whereby losses caused by conduct deemed detrimental to society are transferred from the innocent to those in fault. (2) Various more specific remedies are afforded by Equity which issues the writ of injunction and mandamus, which establishes and enforces equitable titles, liens and priorities, which decree the reformation, rescission or specific performance of contracts, reconveyance and re-execution, cancellation of void documents, redemption of mortgages, which orders contribution, subrogation, exoneration, discovery, election, marshaling, set-off, etc., and relieves against fraud, mistake, penalty of forfeiture, statute of fraud, or any of the merely formal rules of law where their action would conflict with justice, etc., etc. For injury or loss that is caused by conduct not deemed detrimental to society the law gives no relief. For example, A may open a store or build a factory to compete with B and may greatly injure B or ruin him perhaps, but the law gives him no redress, for industrial competition is regarded as a benefit to the community. Moreover, there are many losses resulting from conduct that is clearly detrimental for which nevertheless the law gives no relief be-

cause as we have seen above it does not attempt to enforce the whole of the moral law, but draws broad lines (based on considerations of cost, definiteness of proof, etc.) within which it will confine its action. A man may spend a large part of his wages for liquor, tobacco, billiards, or fancy dress, to the serious damage of his wife and children, or he may spend his days in idleness, or speculation, and the law will not intervene so long as he provides the necessaries of life for his family, and even if he fails in this, no remedy at law is available in many cases, as, for example, where through idleness, bad character or incompetence he has no earnings with which to support his family.

Restraint. Restraint is the primary function of the law in point of time, that is, it was the first to be developed in primeval times. The earliest codes are composed of prohibitions and compulsions—

Thou shalt not murder,

Thou shalt not steal,

Thou shalt not commit adultery,

Thou shalt not bear false witness,

Thou shalt observe the Sabbath day to keep it holy, etc.

To restrain men by prohibiting certain actions is still an important part of the business of the law. The whole of the criminal law is

concerned with prohibitions and the penalties for their violation. And the redress offered by the civil suits and the liabilities on which they are based have also a restraining tendency, influencing men to refrain from the violation of public or private right.

The emphasis changes. The relative proportion of these special functions in the total make-up of the law, varies greatly in different times and countries. Among some peoples in early days the criminal law was practically 100% of the whole, but as civilization advanced, laws of regulation, encouragement and service were developed in abundance. The higher the civilization, the greater the relative development of service and the smaller the proportion of the law that is occupied by the criminal code. In a symmetrical statement of our law to-day, the criminal law would constitute considerably less than 1% of the total.

At the limit of progress the law of restraint would vanish. With any given race or people, the aggressive qualities that give rise to the need for criminal law, are much more prevalent in the days of barbarism than in civilized communities of the same race or people.

Restraint becomes gradually less important. To the savage, surrounded by enemies and spending his days in defense and pursuit, an

aggressive nature may be of the highest utility. But as social organization develops security and the arts of peace, the field for aggression diminishes, and the demand for coöperative qualities increases. The man who retains so much of the savage in his blood as to break out in quarrels, affrays and serious depredations, is a menace to the peace and prosperity of society and is put under the ban of the criminal law; this branch of the law is established to punish and suppress the more serious aggressions due to the survival in social man of an overplus of primitive individualism so pronounced as to be explosive.

The tendency to an equilibrium is a universal law of nature. Antagonistic forces tend to destroy each other and leave only those that can act together in harmony. The laws of nature and the laws of man, the survival of the fittest, and the pressure of social forces acting under the direction of intelligence, are gradually eliminating the primitive man, squeezing out the savage blood drop by drop, and evolving a human nature whose impulses do not lead to aggression but to activities that are not at variance with the social welfare. Law, industry, education and social life are developing a coöperative type of character, the coöperative man, the mutualistic man. There are cases here

and there of reversion to primitive types, but they are most wisely treated as cases of deformity or disease to be corrected or cured if possible, if not, to be so dealt with as to protect society from present harm or future contamination. Society will reach the limit of the usefulness of the criminal law as civilization advances, and as men become more moral and intelligent. Criminal law is like a scaffolding around a giant building. It is necessary during the process of construction, but when the building is complete it is no longer needful. So when the building of the new coöperative nature is complete the scaffolding of the criminal law can be removed.

The law changes in its very fundamentals. The change in the relative proportion of different functions is not the only transformation that is in progress in our jurisprudence. The whole law is in flux from age to age, and decade to decade. In one age we find despotic government, war and slavery, playing a most useful and perhaps essential part in the development of civilization—despotic government compelling men to obedient and concerted action; war and absolutism compressing men into nations and holding them together until the repulsion of savageism might be replaced by the cohesions necessary to civilized life; slavery over-

coming the indolence, inertia and lack of application inherent in the primitive nature, and developing in mankind the power of sustained labor. But when that work is done and men are able to live and work together in well developed social and industrial organizations, the strenuous compressive legal forces will become such colossal evils, that a movement for their banishment will arise, and the details of the law will undergo a corresponding change.

Industrial changes of to-day. Just now we are in transition from industrial competition to coöperation. Industrial struggle and the industrial aristocracy developed by it have done much for civilization. They have developed individual enterprise and taught men combination in industry and coördinated effort in great coöperative groups. For many years economists believed the competitive system to be the permanent status of industry, just as Aristotle regarded slavery as a permanent institution based on the principles of divine right and justice. But our science of political economy in recent years has been undergoing a change almost as remarkable as that which took place in astronomy in the Copernican era. Economists and publicists are pointing out the wastes of competition. They declare that from one-half to three-fourths of our stores

and factories are useless duplications; that large bodies of men are devoting energies to occupations which are really parasitic and detrimental to society; that competition is cruel, wasteful, demoralizing, and in every way inimical to the highest interests of society; that it ruins the lives of millions with struggle and want from the cradle to the grave, and mars the lives of others with pride and luxury; that it builds the slums of the cities and the palaces of the idle rich; that it wastes three-fifths of the industrial forces of the world, with its planless production, panics, strikes, inelastic, degrading wage system that treats the laborer as commodity and denies him the energy born of an interest in his work and its profits, its insufficient care of education, and the innumerable conflicts and useless duplications it occasions; that it has given us a distorted civilization in which half the people own practically nothing, one-eighth of the people own seven-eighths of the wealth and 1% of the people own more than 50% of the total wealth of the country; that 1% owns more than the other 99%, and could buy out the ninety-nine and have something left; that it has given us a standard of value and a division of labor that sacrifices manhood to merchandise; that it gives activity and growth to all that is hard,

combative, unsympathetic, unscrupulous and cunning in man, and hinders the development of sympathy and helpfulness, truthfulness and public spirit; that it rewards injurious activities and gives some of the highest prizes to cunning dishonesty and injustice; that it is destructive of liberty and individuality; that it makes automatons of the millions and imperious despots of their employers; puts wages down and prices up by its wastes and its debasement of the worker; prevents the survival of the best; and has given us a distribution of power that threatens the life of the Republic.

Coöperation superseding competition. There are many indications that competition is giving way to coöperation—that planless production with partial organization of industry for the benefit of a few, will give place to complete and scientific organization of industry for the benefit of all. The growth of public ownership and voluntary coöperation, the evolution of trusts and combines and trade unions, the development of socialistic thought, and the maturer direction of this thought toward a reasonable development of public ownership in the field of monopoly united with voluntary coöperation in commerce, manufactures and agriculture, where the way to coöperation is open without resort to the legislative form—all these powerful

movements are working in the same direction—the replacement of competition by coöperation. Industrial aristocracy is to be replaced by industrial democracy, just as political aristocracy was replaced by political democracy, and for similar reasons, viz.: to secure liberty, equality, protection from injustice, equalization of opportunity, diffusion of power and benefit. In fact there is reason to believe that political democracy itself can only be completely realized through the establishment of industrial democracy; so that the vital and powerful trend of modern times toward political democracy is another giant force working for the extinction of industrial aristocracy and the competitive system on which it is based.

The law responds to this movement. How vigorous is the trend toward coöperation not only in the world of thought but in the world of practical affairs, may be seen by a few plain facts of recent history.

Public ownership increasing. The rapid growth of the movement for the public ownership of public utilities. Nearly all the civilized nations of the world own and operate their telegraph and telephone system and the great majority of them own and operate their railways also. From 1800 to 1900 public water works in the United States developed in round numbers

from 6% to 60% of the whole number.[1] Of the fifty largest cities in the United States, twenty-one originally built and now own their water works, twenty have changed from private to public ownership, and only nine are now dependent on private companies for their water supply. Some of the remaining nine appear to be on the point of changing to municipal ownership, and practically all of them are in process of agitation for such a change.

The public gas plants of the United States numbered fifteen in 1900 and twenty-five in 1906, a growth of 67%, against an increase of 48% for the private gas works in this country. In 1881 there was but one electric lighting plant in the United States. The Census Bureau reports 818 public plants in 1902. The central station list for 1904 gives 927 public plants, and the number is now estimated on high authority at more than 1,000. The census report shows that thirteen plants had changed from private to public operation for each plant that had changed the other way.

Municipal ownership of street railways in this country is as yet in embryo.[2]

[1] According to the study in Baker's Water Manual of 1897 there had been 205 changes from private to public ownership and only 20 changes the other way. (See Equity Series, "City for the People," p. 204.)

[2] A municipal street railway system in Monroe, La., was

In Great Britain over three-quarters of the water works are owned by the local authorities. More than half the gas supply outside of London has been municipalized; more than half the electric lighting plants belong to municipalities, and about half the tramway undertakings are owned and operated by municipalities with

opened for business August 1, 1906. Mayor Forsythe says the enterprise is so successful that "the net receipts will equal principal and interest of the total cost in about seven years." It is stated further that the system has recently been extended eight miles to a suburban park, in which the city offers free bathing and boating to all who care to avail themselves of the privilege. The *Municipal Journal and Engineer* of November 28, 1906, says of this undertaking: "Two years ago the success of the city's move in taking over the water and lighting plants moved the mayor and citizens to go before the State Legislature and have the city's charter changed so as to permit it to own and operate the street railway system. The system is said to be first-class in every respect."

A street railway service over the Brooklyn Bridge was owned and operated jointly for some years by the cities of New York and Brooklyn with entire honesty and marked success, but was finally leased to the elevated in order to unify the service so that travellers would not have to change cars after they crossed the bridge. The municipality of Guelph, Ont., also operates a small street railway, the cause of municipalization being stated to be "public demand and failure of the private corporation to make a success." Toronto, Ont., bought her street railways with the view of leasing them for company management under a contract providing for a large degree of public control, and in the interim between the old and new company managements, the city operated the lines.

nearly 60% of the total track mileage. How rapid has been the development in this field may be seen from the fact that when Leeds and Glasgow adopted the policy of municipal operation in 1894, only three municipalities, Huddersfield, Plymouth and Blackpool, had public tramways. In the next twelve years, 1895 to 1906, more than seventy of the larger towns and cities followed the example of Glasgow, and the only places in the kingdom of any large importance that have not adopted the policy of municipal operation are Dublin, Bristol and Edinburgh.[3]

Basic causes for public ownership. The main cause of this movement for the municipalization of public utilities are to be found in the desire: (1) To secure a better and more extended service. (2) To obtain lower rates. (3) To secure for the city the profits of public service industries. (4) To improve the conditions of labor. (5) To identify the interests of owners and the public and bring into harmony with the public welfare powerful monopoly interests, which in private hands manifest more or less opposition to the public good.

[3] In Germany also rapid progress has been recently made in the municipalization of street railways, some thirty of the leading cities having adopted municipal operation in the space of a dozen years.

(6) To secure to the city direct, continuous and complete control of its streets and all monopoly uses of them. In the United States the principal causes of the municipal ownership movement have been the tendencies to over-capitalization, excessive charges and disregard of public health and safety manifested by private companies, and their corrupt and demoralizing relations with our governments and public officials.

Growth of industrial coöperation. The personal observations of the writer in all the leading countries of Europe, and in this country as well, have deeply impressed him with the vitality and value of voluntary industrial and commercial coöperation. In Great Britain alone 2,500,000 coöperators are united in a solid union with two great wholesale societies, 5,000 retail stores and many factories. They are doing a total business of about $500,000,000 a year; with $50,000,000 of profits, all of which go back to the working people in the shape of dividends on purchases and wages, instead of going to build the fortunes of millionaire manufacturers and wealthy store keepers. In forty years population has increased 43%; manufactures 52%; international commerce 130%; and coöperative business over 5,300%. So that coöperation in England has grown more than

forty times as fast as her international trade, one hundred times as fast as her manufactures, and 130 times as fast as the population. When we remember that her international trade and her manufactures are England's special pride, the most important and energetic elements of her competitive business, we may realize in some degree how marvelous has been the progress of British coöperation.[4]

In the United States coöperative insurance and banking have attained large proportions and coöperative dairying is also well developed in many states. While in manufactures and distribution, coöperation has as yet made comparatively little headway in this country, there still are several hundred prosperous coöperative stores. Coöperative buying and coöperative marketing of products has attained enormous proportions among the farmers and fruit growers. One California association does an annual business of $10,000,000; and another in that state has seventy-five local stores. One society with headquarters at Indianapolis claims 200,000 members. And Iowa alone is said to have 250 grain elevators owned

[4] See the *Arena* for July, 1903, "The Rise of Coöperation in Europe," by the present writer, with a diagram of the movement in Great Britain and a statement of the sixteen principal reasons for the astonishing development of her coöperative industries.

and operated coöperatively by the farmers in their fight against speculators and the railroads for fair prices.

Government already performs many lines of coöperative service. The U. S. government through its Department of Agriculture is coöperating with the farmers in various parts of the country for the development of agriculture; and Federal coöperation with state and individual enterprise for the development of natural resources has shown a decided tendency to increase in recent years.

The trusts are a great coöperation. But most vigorous of all movements towards coöperation in this country is the growth of trusts and combines. Every trust, on the inside, is a coöperation in place of a former competition; and as it grows in size or affiliates with other organizations, the area of coöperation expands. This process, together with coördination of labor organizations and the growing control of the law over industrial combinations in the interest of the public, will probably become, in the not far distant future, one of the most potent means of transforming whole sections of the industrial system to coöperative conditions.

The law should adapt itself quickly to modern industry. Trusts and combines result from the action of the beneficent principles of union

and coöperation. Industrial organization is almost as important as civic organization. Men united into tribes, states and nations because they found that a political combination gave them strength for defense, aggression and civic action in general, and they are learning to unite in great industrial organization because they find that combination in industry means economy and increase of power.

Industrial combination is in itself an economic and social benefit. There are many cases on record in which combination in manufactures has resulted in saving one-half to three-quarters, or even four-fifths of the labor and capital required to yield an equal product under the former competitive conditions.

The law should foster all these movements, the growth of trusts no less than the development of voluntary coöperation in other forms. Our legislators have made a great mistake in endeavoring to crush out trusts and combines instead of aiming to suppress the abuses of combination and repress the anti-social forms of industrial organization, while encouraging the development of combinations not antagonistic to the public good.

Competition means economic waste, bad character product, and civic and social damage. The temporary relief to the public in the mat-

ter of prices is secured at unreasonable cost. For many years economists have recognized these truths in relation to water supply, gas and electric light and street railway systems. And now this old principle is coming to be recognized as equally applicable to trusts and combines.

Trusts are here to stay. The destruction of trusts and combines is a false aim. In the first place, it is impracticable. Trusts and combines exist in obedience to the law of industrial gravitation which outranks any law that Congress or legislature can enact. It is impossible by any legislation practicable in a free country to prevent men from acting in harmony if they have the sense and character to do so. We may prevent corporations from holding stock in other corporations, but we cannot prevent individuals from buying stocks or uniting properties by purchase or exchange of interests therein. Combination is so profitable that it continues to exist and multiply even in the forms prohibited by law.

They are of great economic value. In the second place, the destruction of trusts and combines is undesirable, combination being in itself a social and industrial good. It is not combination, but the abuse of the power of combination that ought to be abolished. The

real problem is to adopt measures that will secure the fair distribution of the benefits of combination and prevent the absorption of an undue share of those benefits by a few individuals, or any arbitrary or unjust use of the powers of combination for private purposes of the controlling owners.

When John D. Rockefeller, in his Standard Oil statement, intimates that laws against trusts and combines are foolish and unjust, he is talking economic sense. Since industrial combination is one of the principal sources of economy, power and efficient service, to prohibit such combination is to prohibit the economy and efficiency that come through combination. To prosecute and fine combination is to prosecute and fine economy and efficiency. Our anti-combine legislation makes economy a crime, progress a misdemeanor, and efficiency a felony. This is all wrong, and so far, John D. Rockefeller is all right.

But they must be strictly regulated by law. But he intimates that the men in possession of trusts and combines should be left to manage them according to their own sweet wills, no matter if they make excessive charges, use unfair methods to crush out would-be rivals, selling low at competitive points while selling high at non-competitive points, resorting to rebates

or railroad favoritism of other types, and using the power of combination to evade or defy the law, corrupt governments and courts, oppress labor, and fleece the public, taking to themselves all the benefits of the economies achieved by combination, and adding, perhaps, new plunder by lifting prices above the normal level of the competitive régime that was formerly in vogue; that combine managers should be left to operate the business as they please, he is talking economic, political and social nonsense.

The law should clearly separate the use from the abuse, and should encourage the former and suppress the latter.

Coöperation will make great changes in the law. The important changes in industrial and social life and institutions that mark the movement from competition to coöperation will involve great modifications in our law, modifications which are already in process in the field of public ownership, the legislative attitude toward industrial combination, etc., and which in the end will not only remold many parts of our legal system but will annihilate large and complex sections of it and replace them with a few simple principles of coöperative service and regulation.

The law and society act and react on each

other. The law is a growth, a development, an evolution accompanying social evolution in general, partly as cause and partly consequence. The interaction is constant and vigorous. On the one hand, for example, tariff laws and franchise grants create monopolies with their far-reaching consequences. While on the other hand, the development of machinery breaks down the feudal system and abolishes its laws and customs, the growth of trade unions modifies the conspiracy laws, the factory laws, the whole body of labor legislation, and demands the modification of the laws relating to injunctions and proceedings in contempt. The religious devotion of early New England wrote the blue laws which went so far as to make it a penal offense "if a boy should sing or whistle on the Lord's day" or "shall go to sleep in church" or "shall chase a girl" or "shall laugh in Public School"; while the irreligion of the West frames laws that permit the stores and theaters and saloons and everything else to run wide open on the Sabbath day. The growth of the sentiment for human liberty wipes the slave laws from the statute books. Smaller changes are constantly in progress. Every legislature and every court is an institution with ample powers and opportunities for the modification of the law.

The law has grown and must grow. Every lawyer, judge and statesman ought to do his best to leave the law at least a little better than he found it. He is not called upon to try to write the ideal on the statute books at once. But it is his duty and his privilege to aid in a reasonable movement in that direction. The law is naturally conservative. It cannot be expected to keep abreast of the best thought. Its movement is obstructed by the ignorance, apathy and self-interest of legislators, and by the inadequacy of popular education and the machinery of self-government. It takes time to crystallize public sentiment into law. The people have no adequate means of expressing and enforcing their will even after they have thought out a new advance. Yet many times the progress of the law is quite as fast as is fair to all the interests involved. It will not do to sweep away too ruthlessly the vested rights and interests that have been allowed to grow up under the sanction of existing laws, nor to sacrifice too far the present generation to the future. Evolution not revolution, should be the method of advance wherever possible.

Changes must promote the happiness of this generation. Society is not an organism with a single conscious center that endures from age to age. On the contrary, every cell is conscious,

and the cells live but a few years. The object now is the happiness of the individuals of this generation, and the law of a republic as a rule will not be changed so rapidly as to make the loss to the living greater than the gain to them, including in gain and loss not only the material elements involved but the intellectual and spiritual elements also. Will it pay in its total results or will it cost more than it comes to,—will the cost to the purchaser exceed the benefit to him, considering all the purposes he has in view? Those are the fundamental questions. The complexities of the problem may obscure the judgment many times, and rough estimates may be made without fully understanding either the impulse or the outcome, but consciously or unconsciously the movement of the law in a republic hinges on the question of cost of living—the question of profit and loss to the present generation. Under a monarchy generation after generation may be sacrificed to the future. But under a system of self-government the people will not serve the purposes of the future any further than those purposes have become their own through development of material interests, intellectual ideals, or moral purposes. They may sacrifice their lower to their higher natures; they may give their lives for the

Union or for the cause of liberty; but the purposes they serve will be their own, they cannot sacrifice their totalities, physical and mental, to the future.

The object of the law demands certain changes now. Wise statesmanship will look for the next step in the line of each advance, take the step carefully and give society, men and institutions, time to adjust themselves to the new conditions before taking another step in the same line of progress. A number of important movements are before the people and the government now, claiming attention as next steps in the progress of civilization in their respective fields. Some of the proposed changes will be noted in the following chapter.

VII

CURRENT REFORM MOVEMENTS DEMAND AND ARE MAKING CHANGES IN THE LAW

In stating these measures, instead of using the judicial form, we will adopt in a large degree the language of those who are advocating the various movements in order to present them with something like the form and force that characterizes them as they come before our legislative bodies demanding their increased recognition in the law.

(1) **Direct legislation.** The Initiative and Referendum; in order that the people may have real and continuous control of the government instead of the mere privilege of periodic selection of a new set of masters, whose will during their term of office is the real sovereign power in place of the people's will.

(2) **Popular nominations.** Direct nominations by popular petition only, in order to destroy the control over nominations which rings and bosses possess under the system of caucus and convention.

(3) **Proportional representation.** Propor-

tional representation, in order that every class and interest of substantial weight in each community shall be represented in true proportion in the legislative bodies that make the laws for that community.

(4) **Voting preferences.** Preferential voting or majority choice, in order that single officers, like mayors, governors, etc., may no longer be subject to the election by a minority of the voters, as under our plurality system, but shall invariably be the choice of the majority.

(5) **Civil service reform.** Extension of civil service system to the end that the "spoils system" may be entirely eliminated from political life.

(6) **Home rule for cities.** Municipal home rule, or self-government in local affairs, such as the control of streets, water works, street railways, fire departments, etc., national government of national affairs, state government of state affairs and municipal control of distinctly municipal affairs, constitutes the true adjustment. There is no more reason to permit Boston, Springfield, Fall River, Lowell and Salem to tell the city of Worcester how it shall manage its street railroads, water works or electric lighting system, than there is to permit Maine, New Hampshire, Vermont, Rhode

Island and Connecticut to dictate to Massachusetts how she shall manage the affairs of state.

(7) **Non-partisan city elections.** Separation of municipal and state elections, and elimination of all party designations from municipal ballots, so that our cities will have a better chance to manage their municipal business on purely business principles, free from the taint of party politics, and to elect municipal officers with reference to their fitness for the work to be done without regard to their political affiliations.

(8) **Public ownership.** The open door to public ownership of public utilities, so that our cities may own and operate street railways, lighting plants, etc., if they so desire.

(9) Exemption of revenue-producing properties from the municipal debt limit.

(10) Provision for the valuation of all public utilities from railroads down to water works, in order to secure a fair basis for the regulation of rates and for estimates of compensation in case of public purchase.

(11) **Diffusion of wealth.** Progressive income and inheritance taxes to aid the diffusion of wealth, which should be one of the prime objects of statesmanship and to provide funds for public use by a system of taxation most in

harmony with the well-established principle already referred to, that equality in taxation means equality in sacrifice.

(12) **A form of "single tax."** The socialization of land values due to the growth of population and the development of civilization, either by public purchase or by the gradual development of a system of taxing land values to absorb the unearned increment for public use.

(13) **Control of corporations.** The regulation of trusts and combines.

Several methods of dealing with trusts and combines are here proposed.

We may let them alone. That might suit the trust magnates, but can hardly be regarded as adequate from the standpoint of the public good.

We may prohibit them. The original savage impulse is to destroy whatever seems to injure us. This primitive instinct crops out frequently in civilized man and even in the most advanced communities, which sometimes manifest a reversion to the savage type of conduct, and resort to blind laws against trusts and combines, trying to destroy what is good as well as what is bad. This method cannot succeed and should not succeed.

We may try to remove the causes of the

growth and power of trusts and combines. The plan of removing the protection of the tariff from industries in which large monopolies have developed is of this class, as are also laws against rebates and railroad favoritism, laws forbidding a corporation to hold stock in other corporations, and laws requiring that goods be sold at the same price to all comers at the factory door.

We may rely upon investigation and publicity. Publicity no doubt does have a powerful restraining effect on the conduct of business affairs wherever the managers have not lost all conscience and sensitiveness to the approbation of their fellow men. But in the very worst cases where relief is most imperative, publicity has proved of little or no avail. The public has known for many years the frauds and iniquities of Standard Oil and the beef combine, and yet those evils have continued in one form or another with practically unabated virulence.

We may provide for Federal license and incorporation with thorough and continuous supervision by Federal authorities. This is an excellent plan from which much good may be expected. But we cannot hope in this way to prevent excessive charges or the secret use of combine power for anti-public purposes.

We may enact that prices and wages shall be subject to final adjudication by boards of arbitration representing all three parties in interest, namely, labor, capital and the public. It is not fair for either party to a sale or contract to fix the terms. In a monopolized industry it is unfair to permit the seller to fix the price, and it would be equally unfair for the public, which is the buyer in this case, to fix the price. The only recourse in harmony with economic and ethical principles is the fixing of prices and wages by decision of impartial tribunals.

We may adopt a system of graded taxes; putting a high rate of taxation on aggressive, anti-public combines which refuse to open their books to public inspection, or make fair prices, or reasonable capitalization, etc.; and a low rate of taxation on public spirited combines which open their books to public inspection and make fair capitalization, just prices, etc.

The reason that men combine to-day in anti-social forms is that profit lies in that direction. If profit can be severed from anti-social methods and attached to forms of organization and management that are in harmony with the public good, while loss is attached to anti-social conduct, men will adopt the superior types of organization and business methods, and trusts and combines will become coöpera-

tive and public spirited instead of aggressive and anti-public.

We may provide that labor and the public shall be recognized as partners in monopolistic industry and entitled to elect representatives to act on the board of directors.

We may resort to temporary public operation of the business of trust and combines which violate the law. If a corporation cannot pay its debts a receiver may be appointed by the court to manage the business of the company until it is once more on a sound basis. So, if a trust or combine is convicted of breaking the law a public officer might be appointed by the court who should manage the business under supervision of the court, using the profits to pay off and extinguish the watered stock or excess capital, reduce wages to a fair level, see that labor had reasonable wages and just conditions, and bring the whole business into harmony with law and the public good. Then the property could be returned to the company to be managed under careful and persistent supervision with salutary fear of public management in case of any further serious breach of law.

We can establish permanent public operation of monopolistic industries, acquiring title by the issue of public bonds or through purchase

with funds raised by progressive income and inheritance taxes, or in any one of several other ways that have been frequently urged upon the public. In the case of railroads, street railways, lighting systems and other natural monopolies where the problem cannot be adequately met by the development of voluntary coöperation, public ownership is the ultimate solution, care being taken in all cases that political conditions shall be made such as to afford a reasonable prospect of successful public operation of these important properties. In commerce, manufactures, and agriculture, on the other hand, where the field is open for the most part, to the growth of voluntary coöperation, legislative coöperation should not be resorted to until every reasonable effort has been made to solve the problem by methods of voluntary action under the direction and encouragement of wise laws.

(14) **Public ownership of monopolies.** The abolition of private monopoly.

We have seen that it is held by the courts that on the fundamental principles of justice inherent in every government taxation cannot be levied for a private purpose, but only for a public purpose, and that an act levying taxes or authorizing the levy of taxes for a private purpose, as, for example, to bestow the money

on a manufacturing company under private control and operated for private profit is beyond the power of a legislative body in a free country, being not an act of legislation but of confiscation.

Every private monopoly involves the power of taxation for private purposes.[1] Wherefore no legislative authority in a republic has a right to establish or permit a private monopoly. It follows that every franchise grant or legislative act creating or protecting a private monopoly is a violation of fundamental principles of justice inherent in our system of government.

(15) The conservation of natural resources, forests, mines, waterfalls, etc.

(16) The establishment of a parcels post.

(17) A national telegraph and telephone system in connection with the postal service.

(18) Postal savings banks in order that the people's money may be absolutely safe and the savings of the common people may be invested for public improvements and other purposes more in harmony with the public good than the Wall Street investments to which our bank deposits are now so largely devoted.

(19) **Government insurance, loans and bank-**

[1] See the discussion of Municipal Charges in MILL'S *Political Economy*.

ing. Government insurance so that loss may be diffused as widely as possible and certainty of payment be rendered absolute and the cost reduced to a minimum.

(20) A government loan office operating through the Post Office and lending money at low interest on reasonable security so that farmers and workingmen may be able to borrow on terms as advantageous as those which are obtained by the great capitalists from our private banks.

(21) The issue of all money by the Government and the management of the money system by public authority in the public interest.

(22) **Direct election of U. S. Senators.** The election of United States Senators directly by the people to the end that the Senate may become as truly representative and as responsive to the will of the people as the House of Representatives.

(23) **Curb the Speaker.** The abolition of the autocratic power of a Speaker of the National House, so that he may no longer be able to interpose his will to prevent the passage or even the discussion of laws demanded by the people, but which are objectionable perhaps to the prejudice of the Speaker or the interests which he may represent.

(24) Old age pensions and disability annui-

ties, in order that industrial veterans and disabled workers may have a reasonable support without the ignominy of a transfer to the poorhouse.

(25) Industrial arbitration or judicial decision of labor disputes. In primitive times all difficulties were settled by combat, but as civilization has advanced the method of judicial decision has been substituted for the method of combat in all classes of dispute except international difficulties and labor contests. International questions are now rapidly being brought within the scope of judicial procedure so that industrial disputes are practically alone in the resort to primitive methods of decision. If two men cannot agree upon their rights, they are not permitted to fight out their troubles in the public streets, but must go into court and submit to the judgment of an impartial tribunal. A corporation and its employés have no more right to fight out their difficulties in the streets to the disturbance of the public business and the production of great loss, not only to themselves but to the public; and our laws should provide for arbitration on the request of either party to an industrial dispute, on the lines that have been adopted in Australia and New Zealand.

(26) The complete establishment of an

eight-hour working day, so that the working classes may have sufficient time for the cultivation of the social and intellectual elements of life.

(27) **Work for the unemployed.** Recognition of the right to work. In this complex civilization of ours, it is many times impossible for men who are able and willing to work to find the opportunity. No guarantee of the right to life, liberty and the pursuit of happiness can avail unless the right to an opportunity to earn an honest living is also guaranteed. The task of keeping an adequate record of the need for labor of various kinds in different parts of this great country and of placing men where there is a demand for the services they can render is too much for any private institution, and should be undertaken by our governments, municipal, state and national. In Massachusetts a State Employment Office has already been established, but it falls far short of the need and its efficiency does not compare favorably with that of the National Employment Office in New Zealand and the Australian Colonies, where the state uses the police and the post offices throughout the country to keep constantly in touch with all opportunities for employment, and carries workers and their families on the state railways free of cost to

the places where their labor is needed, the remitted fares to be refunded at some future time when the earnings of the assisted workers may justify the payment.

(28) **The right to be born well.** A systematic effort to improve the quality of the next generation by the encouragement of breeding from the best and the prevention of breeding from the defective classes.

(29) **The rights of motherhood.** Recognition of honest and efficient motherhood as a public service; protection of mothers from drudgery, want, and other conditions calculated to deteriorate their offspring; provision in the public schools for thorough training in the sciences of parenthood and child culture; and requirement of a working knowledge of the principles of these sciences as a condition precedent to the issue of a marriage license.

(30) **Rights of childhood.** Prohibition of child labor in factories and mines. A child may do some work on a farm or as a newsboy or bootblack without interference with physical or mental development, but the grinding toil of the mill and the mine stunts both the body and soul of the child.

(31) A guaranty to every child, so far as possible, of a wholesome birth and a bringing up under conditions calculated to secure a

healthy and effective development of mind and body. The present system or lack of system under which hundreds of thousands of children are allowed to be born under bad conditions and brought up underfed, underclothed, undereducated and overworked—stunted in body, mind and character—is the most short-sighted public policy it would be possible to imagine, for it pollutes the stream of life and civilization at its very source.

(32) **A better criminology coming.** Improvement of the criminal law. At the dawn of history the prime object of the criminal law was vengeance. Now the main emphasis is placed on the deterent power of punishment, with some attention to reformation. The need is the adoption of better means of prevention and reformation. Probation of first offenders and of women and boys not only of the first but on later offenses also, if need be in the discretion of the judge, is one of the methods by which excellent results have been secured where it has been adequately tried. It is much better to save the young offender by sympathetic treatment and careful watching than to imprison the new recruit with hardened criminals and risk the perpetuation and intensification of the disease by contact with the contagion of inveterate cases. Judge Lindsey's Juvenile

Court in Denver has achieved most notable results on these lines.

Where punishment is meted out, certainty and rapidity are far more important than severity; and more speedy trial and execution of judgment are of vital moment.

The old methods of punishment ineffective. Still more important is the indeterminate sentence. The definite sentence of a stated term of months or years is an unqualified evil. A thief is convicted and sentenced to a year's imprisonment. At the end of that time he is released with the practical certainty in many cases that he will steal again at the first opportunity. There are said to be in New York city more than four hundred professional criminals well known to the police. They have been arrested and convicted again and again, and it is perfectly well understood that they go to operating again as soon as they are out of jail. In other words society knowingly permits four hundred inveterate criminals to be at large to prey upon the city, and employs a body of police and detectives to watch them and run them in whenever they are smart enough to catch them at the game. It would be just as sensible to turn loose a mass of tigers or wildcats, employ a body of men to watch them, arrest any of the wild beasts caught biting any

one, put them in a cage for a few months and then release them to try it over again. When a man has proved himself to be of criminal nature he should be kept under close restraint until he has given evidence of reform sufficient to make it safe to give him his liberty again. The law presumes a man innocent until he is proved guilty. And when he is once proved guilty of a serious offense the law should presume that the criminal nature remains unchanged until there is reasonable proof to the contrary. Instead of a definite sentence of so many months or years therefore, the sentence should be indeterminate, its duration depending on the conduct of the prisoner and the evidence he gives of sufficient reformation to restore the presumption of future innocence and make it safe for society to restore his freedom.

Reformation the goal. Meanwhile, during his confinement, every effort should be made to aid the prisoner to regain his manhood. The most successful methods so far tried are the appeal to appetite, honor and the cultivation of the power and habit of useful industry. In one of the best prisons for example, where reformation has been reduced to a science, the method is as follows: Three tables are set in the dining room where all the convicts eat. At the first table the fare is little more than bread and

water. At the second table there is an abundance of well cooked plain and wholesome foods but no delicacies. While those at the third table enjoy all the delicacies of the season and the best cooking obtainable. The convicts who refuse to work in the prison shops sit at the first table, but they get the fragrant odors from the other tables and they soon begin to ask for work. Those who work regularly and conduct themselves well are entitled to seats at the second table and if they achieve success in their work and attain a certain standard of merit in labor and conduct, they are promoted to the third table. There are carpenter shops, machine shops, shoe factories, saw mills, stone yards, printing shops, etc. The convict learns a trade by means of which he can support himself by honest labor anywhere in the civilized world. He gets full pay for the value of the work he does, part of which goes to pay the expenses of his imprisonment. Another part is devoted to restitution or compensation to the persons injured by the wrong for which he was committed. Still another part goes to the support of his family if he has one. And the remainder is put to his credit and paid over to him when he leaves. The time of his release depends upon his record. When in the judgment of the Court he has given sufficient proof of fixed

habits of industry and good conduct he is released. He goes out with the money he has earned by honest labor in his pocket and the consciousness of skill that will enable him to make a good living without resort to crime. At the prison gate he is met by the officers of a sympathetic organization that will help him find employment and friends and keep him from his old associations until he is firmly rooted in the new life of an honest citizen and has become a useful member of society.

Such are some of the methods that should be grafted into the criminal law of all our states. There are other measures which are very important in their relation to the prevention of crime but which are also advocated on other grounds as follows.

(33) **Better opportunities for immigrants.** Better immigration laws. In addition to sound body and mind, good character and visible means of support, immigrants who come to remain in this country should be required to acquire a working knowledge of the English language. There should be a national bureau to help immigrants to place themselves in localities where their labor is needed and to get a foothold in the path that leads to good citizenship and industrial independence. Society has as much of a duty to protect itself from the in-

fection of mental and moral disease and debasement, as it has to guard itself against physical contagion—as much duty to determine the sort of people it will admit to fellowship as members of its communities, as a family has to decide what sort of folks it will admit to its fold, what associations and influences shall be brought to bear upon its children. Immigration that is adapted to republican institutions and twentieth century civilization, is no problem, but half-civilized and uneducated populations bring us an opportunity for social assimilation and civic service of a high order. The state for the general welfare must provide education, protection and opportunity for these wards. They should be fed and clothed if necessary while they are taught the elements of American citizenship and helped to secure the opportunity to become self-supporting. They should be if necessary compulsorily taught, and paternally looked after while their opportunity is being found.

(34) **Government should clean up the slums.** The slums of our big cities are prolific sources of disease and crime. The law should provide for the clearance of slum areas and the permanent abolition of the conditions which now exist in those areas where thousands upon thousands of children are being brought up under circum-

stances directly and definitely calculated to create defectives and criminals. Laws should be passed to enable our cities to do as Birmingham and other English cities have done, namely, take over slum areas, tear down congested and unsanitary buildings, open up wide thoroughfares and recoup the cost by retaining the ownership of the land along the boulevards and renting or building upon it for the benefit of the city.

(35) **Take the profit out of the saloon.** Abolition of the traffic in liquors for the profit of the seller. Just so long as the vendors of intoxicants can make a profit by their sale, there will be an organized effort to attract boys and workingmen to the saloons to spend their wages for drink and the development of drunkenness and crime will be the result. Eminent judges declare that from three-fourths to nine-tenths of the crimes and misdemeanors that occupy our courts are the direct or indirect results of the traffic in intoxicants. A recent grand jury, after dealing with the winter docket of crimes, states that, "the grand jury feels it a duty to state that in many cases brought before us, a few drinks of liquor have preceded the trouble. The expenses of this jury, of the State's attorneys and stenographers, together with the great expense which

must follow in order to punish adequately the men we have indicted, therefore apparently flow in great measure from the presence of saloons.''

The Gothenburg system. It is not necessary, in order to remedy these conditions, to prevent individuals from drinking intoxicating liquors. All that is really necessary is to sever the relation which now exists between the sale of liquor and the profits of the seller. The existing order of saloons should be abolished, and in their stead a better kind of saloon established, where men could find the social atmosphere they crave and could buy liquors, if they chose, in moderate quantities and under stringent regulations calculated to prevent the possibility of intoxication; where the seller will have no profit from the sale of liquors, but will make a profit on the sale of non-intoxicating drinks to be sold in great variety in the same saloons. In this way the vendor will have every interest to develop the sale of temperance drinks and no interest at all to increase the sale of intoxicants; instead there will be a definite counter interest resulting from the fact that if men buy intoxicants, the demand for the temperance drinks on which he makes a profit will be to that extent diminished. This is substantially the

Gothenburg system which has produced such admirable results in Sweden. The state should guarantee the purity of the liquors and to carry out the plan in sufficient perfection might find it best in the end to take over the manufacture of intoxicants and abolish entirely the private liquor business from the manufacture to the sale. If such a plan on thorough trial in American cities should not eliminate drunkenness and the criminal effects that now flow from the consumption of intoxicating liquors, more drastic measures would be then in order, even to the complete abolition of the manufacture and sale of intoxicants, if that were found to be the only means of ridding society of this prolific cause of crime and debasement.

(36) **Train the children for the work of life.** Industrial education and expert vocational counsel. Our public schools teach the common English branches, but as a rule give no definite instruction in the means of making a good living. Society is very short-sighted as yet in its attitude toward the development of its human resources. It trains its horses, as a rule, better than its men. It spends unlimited money to perfect the inanimate machinery of production, but pays very little attention to the

business of perfecting the human machinery, though by far this is the most important factor in production.

The great mass of our children leave school before getting even a reasonable training in the common branches of an English education. According to the figures given by the school authorities a year or two ago less than 1-16 of the children in the Boston primaries go through a High School course. In Philadelphia less than 1-30 of the children go through the High School, and in Washington less than 1-13. Here are the data for these three cities. The High School figures include the pupils in all schools and courses of High School grade, commercial and manual training, as well as academic.

PUPILS IN THE PUBLIC SCHOOLS.

	Boston	*Philadelphia*	*Washington*
First year primaries.....	13,622	33,588	9,198
First year grammar.....	10,007	19,386	5,061
Last year grammar.....	4,869	5,710	3,136
Last year high schools.....	850	1,089	663

Nearly two-thirds of the children in Boston and Washington and five-sixths in Philadelphia drop out of school even before they finish the grammar grades. There are not seats enough in the grammar schools for much over one-third to one-fifth of the children, nor seats in the High Schools for more than one-tenth to one-

twentieth. Our cities evidently do not expect or intend to educate the bulk of the boys and girls beyond the primaries or lower grammar grades. The mass of children go to work to earn their living as soon as they are old enough to meet the law, and often before that.

Do not specialize too young. Science declares that specialization in early years in place of all-round culture is disastrous both to the individual and to society. There is a clear relation between intelligence and variety of action and experience. A knowledge of each of the great classes of industry by practical contact is the right of every boy. This varied experience should be obtained under a thoroughgoing, scientific plan of educational development and not by the wasteful and imperfect method of drifting from one employment to another in the effort to make a living, running an elevator in one place, marking tags in another, tending a rivet machine in another, etc., etc., spending many years of time and energy in narrow specialization, and getting no adequate, comprehensive understanding of any business or industry.

The union of a broad, general culture with an industrial education including a practical experience broad enough to form a true foundation for specialization in the proper field, pos-

sesses an economic and social value that can hardly be overestimated. Yet practically all our children are subjected to the evil of unbalanced specialization—specialization that is not founded on, not accompanied by the broad culture and experience that should form its basis and be continued as coördinate factors in a full development—specialization that is not only unbalanced and ill-founded but also in many cases inherently narrow, inefficient and hurtful in itself.

But learn to do something. Most of the children who leave school early specialize on narrow industrial lines, and most of them who remain in school specialize on book learning. Book work should be balanced with industrial education, and working children should spend part of their time in culture classes and industrial science. Society should make it possible for every boy and girl to secure at least a High School education and an industrial training at the same time. This can be done by the establishment of Public Half-Work High Schools, in which boys and girls can *study half of each day,* and support themselves by *working the other half day* for the public water works, lighting or transportation systems, street departments or some other department of the public service, or for private employers.

Part time schools are practical. A city or town can easily make arrangements with merchants, manufacturers and other private employers, whereby High School pupils may have the opportunity to work half time in many lines of industry. The Women's Educational and Industrial Union of Boston is already carrying on this sort of arrangement with some of the leading merchants of the city, so that the girls in the Union's classes in salesmanship are able to support themselves and get most valuable practical training by working half time in the stores. Enlightened employers are glad to make such arrangements, realizing the importance to themselves and to the whole community of such advanced industrial and cultural training. Some of our agricultural colleges and state universities, especially in the West, afford opportunities for young men and women to earn their living while getting a college education. All that is necessary is to extend the methods and principles already in use to the public school system as a whole, so that no boy or girl shall longer be debarred from the training of mind and hand, which is the rightful heritage of every child society allows to be born into this complex and difficult world.

With proper provision for self-support by half-time work, the law might well require that

school attendance should be continued until sixteen or even eighteen in place of the present requirement of fourteen years.

A variety of scientific trade schools and continuation schools should also be established on the plan that has done so much for the development of German industry in recent times, whereby young people after leaving ordinary public schools may continue their education, general and industrial, by attending these special schools in the evening or on part time.

Expert vocational advice should be provided. In connection with the public school system of education throughout the country, provision should be made for expert counsel in the choice of a vocation. Young people should be thoroughly tested and aided and helped to come to a true understanding of their aptitudes, abilities, interests, resources and limitations, and the relations of these to the conditions of success in different industries, substantially on the lines adopted by the Vocation Bureau established by Mrs. Quincy A. Shaw in connection with the Civic Service House in Boston on plans drawn up by the present writer at the beginning of 1908.

An account of the Bureau and its methods and results may be found in the *Arena* for June, July and August of this same year.

(37) **Civic training in the public schools.** Education for citizenship. The School City, or student self-government, should be established in connection with all public schools as one of the most important means for the development of character, civic interest, and habits of good citizenship in the plastic years of youth before the money motive has come to warp the judgment and the conscience.

Still more emphatic is the duty of improving our general system of education.

(1) By providing for thorough and scientific moral training, both by precept and practice, from the primary up through the High School and the university. Care, thoroughness, reliability, energy, enthusiasm, courtesy, helpfulness, coöperation, sympathy, kindliness, the sense of justice, etc., can be developed by exercise, just as the muscles and mental faculties are expanded and strengthened by exercise, and such development should be made a prime object of our educational system.

(2) The laws of health should be drilled into the children so persistently and effectively that, in addition to a clear understanding of those laws, obedience to them shall become habitual, and daily living in full accord with the laws of physical well-being shall become the natural order of society.

(3) Full instruction should be given in the public schools in regard to the relations of the sexes so that boys and girls may come to a knowledge of this vital subject from the moral and scientific side instead of getting their information from polluted and secret sources as they do for the most part now. The conditions of true marriage and the best methods of child culture should also be taught together with ideals of conduct that will cause defectives to refrain from multiplying their kind, and lead to the breeding of each generation from the best of the preceding generation instead of from the lower strata chiefly as is the case at present. A satisfactory record of proficiency in such courses of instruction, and a thorough working knowledge of the principles involved, might well be made the conditions precedent to the issue of a marriage license.

(4) The *methods* of general culture should be materially modified if we are to give our boys and girls an adequate preparation for life and work instead of a preparation for passing an examination to get a degree. We should train for ability and character rather than for examinations. And the principal test should be the successful performance of things that have to be done in daily life rather than the answering of a series of questions about a book

or lecture course. Systematic and scientific training of body and brain, of memory, reason, imagination, inventiveness, care, thoroughness, truth, promptitude, reliability, sympathy, kindliness, persistent industry, etc., etc., is what we need. Education for power with actual performance and useful work should be the fundamental test. Power in any direction comes from *exercise* or activity in that direction together with sufficient development in other directions to give symmetry and balance to the whole. Even the power of sympathy and the sense of justice can be developed by daily exercise on the same principle that we develop the biceps or the bicycle muscles. Knowledge is excellent but a man with knowledge only, without the power of original thought and the ability to put his ideas into effective execution is little better than a book,—he contains a record of facts but cannot build or execute. He may not be even up to the book standard of life if he has not learned to *express* and *impart* his knowledge. That is why college graduates, even those who stood high in their classes, often fail to make good in business. They are good bookworms, sponges, absorbing machines, but they do not know how to do things, and have no taste for doing things. They are really unfitted by their habits of passive absorption for

the active life of the business world. We must train our students to full powers of action, not only in football and other athletic sports, but in the various lines of useful work so far as possible according to their aptitudes as brought out by scientific tests and varied experience. And we must give our working boys the power of thought and of verbal expression that come with general culture. And we must do all this in the formative period before the progressive hardening of the system has taken the bloom from development and modifiability.

The state should prepare every child for a useful life. Youth is the period of plasticity and rapid development in which the foundations should be laid for an all-round culture, character development, and special vocational power. In the schools we have the next generation plastic in our hands ready to be molded to any form we please. The fluidity of youth is shown in the fact that practically 75% of the infant's body is water, while only 58.5% of the adult's body is liquid. Though some degree of plasticity may be retained to the end, the more fundamental characteristics of a man are generally fixed at twenty-five and the mental at thirty-five to forty years. If you were molding a statue in plaster you would not think it wise to neglect

the work or let it drag along half done till the plastic mass had stiffened into rigidity. It is just as unwise to neglect the opportunities afforded by the plasticity of youth. A year of the period from fifteen to twenty-five is worth more than two years after thirty-five for formative purposes and the development of power. In this plastic period of rapid growth, this age of brain and heart, society should guarantee every child a thorough all-round development of body, mind and character, and a careful planning of and adequate preparation for some occupation, for which, in the light of scientific testing and experiment, the youth seems best adapted, or as well adapted as to any other calling which is reasonably available. If this vital period is allowed to pass without the broad development and special training that belong to it, no amount of education in after years can ever redeem the loss. Not till society wakes up to its responsibilities and its privileges in this relation shall we be able to harvest more than a fraction of our human resources, or develop and utilize the genius and ability that are latent in each new generation.

VIII

CERTAIN CHANGES ARE NEEDED NOW IN OUR SYSTEM OF LEGAL PRACTICE

Among the progressive measures that are pressing for adoption are several that affect the form and methods of the law as a system of jurisprudence.

(1) **One action for all rights.** The law should provide in all our states that the plaintiff should secure in a single action all his rights in relation to the cause at suit.

(2) **Technicalities should be minimized.** No suit should be allowed to fail for lack of form. Technicalities should be eliminated from our system of jurisprudence so far as possible, and direct decision on the merits of the case, free from all technicalities of every class, should be the rule in all our courts.

(3) **Simplify the law.** Simplification and unification of the law is of very great importance. It is absurd beyond expression that the laws of our various states should differ in regard to what constitutes a valid marriage or sufficient ground of divorce, the rights of husband and wife, the descent of property, the methods of making a valid contract, etc.

Codification has been proposed as a remedy for the complexity and incoherence of our common law, but there is reason to believe the remedy far worse than the disease. Codification takes the life from the law. It gives you canned law instead of fresh fruit picked day by day from the living tree. To attempt to reduce the principles of the common law to any stated form of words is to destroy the very essence of the common law and establish an inert rigidity in place of the vital flexibility and adaptability that constitute the great superiority of our common law. Our statute law is universally regarded as inferior to the common law for the very reason that no legislator can foresee and provide for all the contingencies of future cases, whereas the common law, untrammeled by set phrases and inflexible provisions, freely applies the principles of justice and common sense to all the facts and circumstances of each new case as it arises.

The true path to the simplification and unification of the law lies through conventions of judges and statesmen, who will bring together the laws of their states, and try to harmonize and simplify them by agreeing, not on any set phrases or fixed provisions, but on the principles to be followed in administering the common law in all the states.

For statute law a similar plan might be adopted, but definite phrasing might be attempted in this case, since codification may well be applied to statute law, though destructive to the most valuable characteristics of the common law.

(4) **Revise law of evidence to facilitate justice.** The law of evidence should be revised in order to eliminate the rules which tend to delay and defeat justice rather than aid its administration. A scientist making an investigation would not hamper himself with technical rules nor with any limitations beyond those involved in a scientific effort to secure evidence relative to the subject in hand, and he would give each part of the proof its due weight in the formation of his conclusions. It is not possible in a court of law to follow entirely the broad and simple methods of scientific investigation, but it is possible to come much closer to that ideal than is the practice to-day, aside from the examinations made by the Masters in Chancery which approach quite closely to the scientific method. Jury trials at law are hedged about with numerous limitations which often cause unnecessary waste of time and money in the trial of cases and not infrequently produce a miscarriage of justice. The very

multiplicity of the rules of evidence opens the way for cunning lawyers to raise doubts and disputes and take appeals, to the great increase in the cost and difficulty of legal proceedings. In the Standard Oil trial before Judge Landis, for example, the Oil Trust lawyers took 169 exceptions. In some of the famous murder cases hundreds of exceptions have been taken to the rules of the trial court. In this mass of exceptions, taken in the course of long and complex trials the Appellate Court is very apt to find some departure from the rules of law in respect to the admission or exclusion of evidence, on which a new trial may be ordered, justice delayed and perhaps finally thwarted. The rules of evidence should be so broadened and simplified that technical objections and masses of exceptions will become a practical impossibility.

(5) **Provide for intelligence in jurors.** The Jury System, though perhaps the best method that can be devised for keeping the fountains of justice free from the bane of class prejudice and professional bias, is nevertheless far from satisfactory in its present form. A great improvement might result from an educational qualification for jury service. Certainly no man who has not at least a High School educa-

tion or its equivalent, as well as a character above reproach, is fit to sit in judgment on his fellow men.

The method of drawing jurors might also be improved. Perhaps it might be a good plan to have the judges draw up the lists for jury service and then subject such lists to the Grand Jury for approval.

(6) **Give better treatment to witnesses.** Provision should be made for the better treatment of witnesses, especially in criminal cases. It is a gross injustice that innocent persons should be subjected to imprisonment in the common jails simply because they happen to be important witnesses in future trials. The story called "The Silent Witness" in *McClure's* for January, 1896, contains a vivid illustration of what may happen to a witness under our present law. A young man from the country was passing the door of a saloon in New York, when a crowd of men came pouring out, surrounding two men who were fighting. As they reached the pavement, one of these men drew his revolver and shot the other. The crowd scattered. The countryman, seeing the criminal about to escape, grasped and held him until the police arrived. They not only arrested the murderer, but took the countryman into custody also as the only obtainable witness of the

crime. He was put in jail and kept there in order to make sure of his appearance at the trial, and during the long months before the case came into court, the disgrace and confinement so wore upon him that when at last the trial came on, it was found that the witness had died in prison. This is an extreme case, of course, but it forcibly illustrates the deep injustice of any system of laws which will permit the imprisonment of innocent persons who may be wanted as witnesses in the state's behalf.

If a witness cannot be trusted to appear when a case comes on for trial, it might be right to shadow him with a detective in order to be sure that he stays within reach of the court. If a witness fails to appear when ordered by the court to do so, it is proper then to subject him to imprisonment as punishment for his contempt. But to deprive a witness of his liberty, and keep him for weeks and months together from attending to his business without any remuneration for his loss of time and liberty or the ignominy of imprisonment is clearly a crime committed in the name of the law.

(7) **Redress for false accusation.** Reasonable redress should be insured by the law to persons falsely accused. In civil cases an action lies for damages for malicious prosecution, but in criminal cases the state may prosecute

the wrong person, hold him in prison for months or even years, destroy his income, ruin his business and cover his name with ignominy, and the man has no redress. This is an outrage of which no legal system should be guilty.

(8) **Expense and delays in securing justice should be abolished.** Free and speedy justice should be ensured to every citizen. Many times the cost of litigation compels an injured party to endure the wrong rather than incur the loss and inconvenience involved in prosecution. Cases are on record where men have spent fortunes in trying to protect their rights in the courts, and through numerous appeals and long delays and the excessive cost of legal proceedings have been compelled at last, through the exhaustion of their resources, to abandon the effort to protect their rights, losing in the legal battle both their fortunes and the rights they sought to protect. Such, for example, was the experience of the man who discovered the new process for refining oil. The Oil Trust people stole his invention and fought him through court after court until his means were all exhausted and he lost both property and invention. The man who invented the railroad spike, it is said, was worth $50,000. But the railroads used his invention without acknowledgment. He prosecuted them.

They fought the suits through court after court until his money was gone and justice beyond his reach. Such a system makes the attainment of justice, in many cases, a matter of combat little better than the methods by which our barbarian ancestors settled their disputes; the difference being simply that they fought outdoors with their swords, while we fight in the courts with purses. If the state is to protect the rights of its citizens, it must see to it that the administration of the law is made so swift and sure and costless to the plaintiff who has a well-grounded case, that the resort to the courts for legal redress may cease to be a greater evil than suffering the injury which forms the subject of complaint.

IX

ESSENTIAL PRINCIPLES TO WHICH THE LAW SHOULD ALWAYS CONFORM

The fundamental problem of law and government. All the measures we have mentioned, from the improvement of the criminal law to the right to work are phases of the fundamental problem of law and government, viz.: the establishment of the best conditions for the development of higher types and the fostering of institutions in which such higher types find their natural expression and means of action. Man and the law are both results of the action of great natural and social forces, that have brought them both from barbarism to civilization, and will carry them on to still higher levels, not perhaps to a condition worthy to be called ideal, but certainly much nearer to it than we are at present. While we cannot expect to reach the ideal we can earnestly move in that direction with the purpose of approaching it as closely as may be practicable. The basic method in such approach is the elimination of anti-social motives and habits, and the development of social motives and habits.

An ideal not yet reached. In the ideal state, desires which cannot be satisfied without infringement of the rights of others, would be reduced to a minimum, and the essential egoistic impulses still remaining would be guided and governed by an altruistic will, a will in tune with the public good, and representing social thoughts, principles, motives and habits trained into the very nature of the child by precept and practice throughout the period of its education from the cradle to the end of school and aided and developed in after life by the influence of coöperative industry and a political co-partnership existing not in name alone, but in full realization of the principles of democracy and the spirit of brotherhood.

The way to reach the ideal state—Individuals must progress in advance of institutions. The path to the ideal society lies through the improvement of individuals. Perfection in the social organism is a question of cellular development. If all the cells are perfect, they will group themselves in perfect forms, assume true relations, and the whole will be perfect. If any cell is crushed by injustice, cramped by ignorance, starved by poverty, deformed by vice, corrupted by luxury or poisoned with selfishness—if any cell is imperfect in any degree, the whole falls short of perfection by the de-

fects of the faulty cell, and the false relations resulting therefrom. The development of good and repression of evil in individual men and women is the fundamental process. Especially is education of the children, the fresh and plastic cells, a mighty power for the reorganization of society. Institutions mold mankind, but institutions are themselves the product of individual thought and feeling. A man of clear perception and keen appreciation of the right, raises his voice against a grievous wrong, and points perhaps to the remedy. Some of his hearers are stirred to truer thought and have their emotions directed and deepened. They in their turn modify the minds and hearts of the people they meet. Opposition to the wrong increases thus until it becomes Public Sentiment. Then laws and institutions are changed, and the wrong vanquished. The new institutions bring the lingering minority of mankind into harmony with the new advance, and mold the natures of all into more perfect fitness for further progress. Thus institutions and statutes are merely a part of the means by which individual improvement achieves further individual improvement. Perfect manhood the object—ennobled manhood the means. No wise man will lose a chance of deepening and correcting his ideas of social questions,—or

neglect an opportunity of modestly impressing his thought and feelings upon others, or receiving their views for his enlightenment. Every brain he sets to thinking, every heart he sets in motion in behalf of those who dwell beneath the shades of Poverty, Injustice, Vice or Something-That-Ought-Not-to-Be, is an item in the column whose addition makes up "Public Sentiment," "Law," "New Institutions." The transformation of ages may flow from the heart of a child, and the humblest student of social science may drop some word, that, taking root, in the brain of a man who trundles the world at his heels, will lift humanity into a new and higher type of civilization.

Good and evil mixed in every man. The development of good and the suppression of evil is the prime business of the law. If evil were found in a state of absolute purity, like Royal baking powder, it would be easy to annihilate it at once. But, unfortunately, good and evil are not chemically pure, but are mixed in the nature of every man, and there is no way to repress the evil but to put pressure or limitation on the man who manifests it, so that it is impossible to oppose evil without to some extent hindering the activity of the good qualities bound up with the bad ones in the person whose freedom is limited.

This leads to two considerations of great moment, as reducing to a minimum the inconvenience resulting from this union of good and evil in every person—the selective effect of intelligence and the separative and progressive power of proportionality.

The need of selective intelligence. Repression and encouragement are of two sorts—one of which acts upon the intelligence of the person operated upon, while the other acts independently of, or aside from his intelligence. If a boy is whipped for making faces at his aunt, the shingling does, for the time being, repress his smiles, as well as the forbidden grimace, but, as to the future, the whipping has no tendency to diminish his laughter, but only his impudence, for the youth knows the purpose of his punishment,—through the medium of his intelligence, bad action is separated from good, and the repression applied to the former,—that is, the trans-intellectual effect of punishment is selective.

The extra-intellectual effect, including the deterioration of physical and mental powers owing to imprisonment, disease, remorse, or other repression following vile action, falls to some extent on the good qualities of the actor, —the total power of his life is diminished.

But the repression may, by its trans-intellectual power, stop up the channels into which a portion of his life current was pouring, thereby turning the stream more completely in the direction of good, so that although his total power is decreased by the bodily and mental effects of his punishment, yet so much larger a percentage of his vigor goes to good than was formerly the case, that his beneficial activities are absolutely, as well as relatively, larger than before.

The principle of proportionality. Turning now to the second consideration above mentioned, the principle of proportionality is of vital moment. It is the core of equity, the heart of justice. It is clear that the amount of encouragement or repression in each case must not be arbitrary, or uniform, but must be proportioned to the degree of good or evil in the action or promise in question, for if repression is not duly proportioned,—if the same punishment is meted out, and the same consequences accrue, to two men of different degrees of guilt, there is no reason for the better to be so. If he is to incur the punishment any way, he may as well sin up to it, so far as that influence is concerned. As the old proverb has it, "One may as well be hung for a sheep as a lamb."

If, for example, theft and murder were punished with equal severity, a robber, seeing that his danger is the same if he is convicted of theft, as if he were guilty of murder, will naturally be incited, in many cases, to kill the person whom otherwise he would only have robbed; since, if the penalty is the same, there is more security and less danger of discovery, when he that can best make the discovery is put out of the way.

Is essential to justice. The element of proportion, so essential to the idea of justice, is tacitly recognized in every criminal code of the world,[1] by the graduation of offenses and pun-

[1] There is one notable exception in history,—an exception that most strongly emphasizes the necessity of proportion. In the year 624 B.C., Draco was appointed to draw up a code of laws for Athens. He provided the same penalty,—death,—for every offense—the slightest theft or even laziness, as well as murder or treason. Such laws were too cruel to be enforced. "Sentiments of humanity in the judges, compassion for the accused when his fault was not equal to his suffering, the unwillingness of witnesses to exact too cruel an atonement, their fears also of the resentment of the people—all these conspired to render the laws obsolete before they could well be put into execution. Thus they counteracted their own purpose, and their excessive rigor paved the way for the most dangerous impunity." Grimshaw, p. 23. These intolerable laws remained in force until 694 B.C., when Solon repealed them all (retaining the death-penalty for murder only), and established a criminal code in which punishments were graduated to the various degrees of offense. On this whole subject, see GROTE'S *Greece*, chaps. 10, 11.

ishments; the principles being applied with a skill determined by the knowledge and character of the legislator.

Permeates the whole law. The same principle permeates the civil law of every nation. Each is to receive payment in proportion to what he has given, or the service he has rendered,—that is the meaning of *quantum valebat* and *quantum meruit*. Each is to pay in proportion to the damage he has caused,—that is the law of torts. Each is to bear such part of an innocent loss as corresponds to his share of the interest at risk,—that is the law of general average, distribution among creditors in cases of insolvency, contribution among insurers and co-contractors, and sureties of all kinds, abatement of legacies when the assets are deficient, etc., etc. The popular maxim "Equality is Equity,"[2] means, not numerical equality, but

[2] That equality as to burdens, services, etc., means proportionality as to individuals may be seen with the utmost clearness by an example. Suppose A to have rendered three times the service that B has. The law of equality between service and reward will give to A three times as much reward as B receives. B's service is 1, and his reward 1. A's service is 3, and his reward 3.

B's reward is not equal to A's, but bears the same proportion to A's reward that B's service bears to A's service. "Equality is Equity," does not mean numerical equality, except between those who are really equal in respect to the essential circumstances to which the maxim applies, or who

equality of burden to benefit, reward to service, punishment to fault, damage to loss caused, contribution to interest, etc., etc., which, applied to individuals means that each is to be burdened in proportion to benefit, rewarded in proportion to service, punished in proportion to fault, required to pay damages, in proportion to loss caused by his detrimental conduct, and to contribute to a common enterprise in proportion to his interest in it.

Limits the taxing power, and even the legislature. One of the readiest illustrations of this principle is the limitation of the taxing power. Our courts declare that it is of the essence of justice that a common burden shall be sustained by a common contribution.[3] An apportionment of the tax among all those interested in the purpose for which the fund is to be expended, is a necessary element in all taxation, and any attempt at the exercise of the taxing power by the legislature, without such apportionment is absolutely void, even without any express provision in the constitution. For such legislation would be a violation of the implied limitations upon the government that grow out of the very nature of free

come within the principle of the next section. See Story's Jur., p. 558.

[3] See Blackwell on Tax Titles, Parsons' Edition, p. 24.

institutions,—would be beyond the authority which the people have delegated to the legislature.[4] For instance, a tax levied exclusively on real estate, for a purpose in which the owners of personal property are also interested, is beyond the power of the legislature.[5] So is a tax on County A for the common benefit of that and another county not taxed.[6] Neither is it any more proper to levy a tax on a wide district for the benefit of a portion of it. Taxes raised by a city partly in each of two counties, cannot be voted toward the courthouse of one of the counties.[7] The legislature cannot set aside any race as special objects of taxation.[8] If it is clear that the legislature has imposed a tax on a class, or on a district, without regard to the proportion of burden to benefit, the courts will not sustain it. It cannot select classes or districts for manifestly exceptional burdens.[9] Among those within the proper field of the tax, the maxim "Equality is

[4] See p. 35, 20 Wallace, 655; 18 Mich. 495; Sedgwick on Statutory and Consti. Construction, p. 177; 2 Ken't Com. 331; Blackwell on Tax Titles, Parsons' Ed., 24, 35; Cooley on Taxation, pp. 2, 140.

[5] Gilman v. Sheboygan, 2 Black, U. S. 510.

[6] See decision of Sharswood, J., in Hammett v. Phila., 65 Pa. St. 151; also 64 Ala. 266, and 9 Minn. 293.

[7] Blackwell, 54; Bergen v. Clarkson, 6 N. J. 352.

[8] Lin Sing v. Washburn, 20 Cal. 534.

[9] Blackwell, 53; 12 Allen, 223, 237; 65 Pa. St. 146, 151.

Equity'' means Equality of sacrifice or taxation in proportion to ability to bear it.[10] The taxing power is one of the best illustrations of the mighty hold that the principle of proportionality has upon our law,—it is indeed as we have previously pointed out, the very soul of justice,—and so deeply reverenced by our judges that they do not hesitate to declare that it is embodied in the very idea of free government, and that an act of the legislature in contravention of it, is not a law at all,—not an act within the authority of the legislative agents of a free people.

Proportionality essential to development. Examining the matter in the broadest light, it is clear that proportionality is an essential element in the law of development, the law of the movement toward the Ideal. The better life must receive the higher reward in order that an influence may be brought to bear on the lower life to move it toward the higher. If, in any respect, the inferior is rewarded equally with the superior, one influence tending to urge the inferior to acquire superiority is lost.[11] The best must prosper most, for if the worse

[10] See Cooley on Taxation; the works of Walker & Mill, on Political Economy.

[11] Sometimes as a choice of the least of two evils, we have to forego one proportionality in order to secure another of higher value.

prosper most, the movement will be downward. If A at the zero of conduct and of promise, receives the zero reward and the zero repression, then B at one degree of conduct or promise above zero, should receive one degree of reward; C at two degrees above, two degrees of reward; D at three degrees above, three degrees of reward, and so on: and M two degrees below zero, should receive two degrees of repression and so on. The same thing holds in relation to good and bad faculties in the same man, as in the relations between one man and another. If B is deprived of a motive for struggling to improve himself, and come up to C's standard, and C has no motive to maintain his superiority, he might as well be as lazy, careless, dishonest, and selfish as B—as he will fare as well. So, if C and D are treated alike, C has no motive to go up, and D may as well relax his efforts, and fall to the level of C. The law of development therefore requires apportionment. Only by a carefully adjusted graduation of repressions and encouragements along the whole line, can we bring to bear on every man and on every faculty a continuous pressure upwards. If, in going from bottom to top, there is any step of merit that is not met by a corresponding change of reward, the impetus to take that step is absent.

Diffusion of burdens and benefits. Closely allied to the principle of proportionality and in fact a corollary from it, is the principle of the diffusion of burdens and benefits that result from natural causes or broad social influences and not from the individual conduct of the persons burdened or benefited.

Distributing the effects of accidents. The leveling of accidents, and the equalization of equal lives so far as practicable, is a duty clearly imposed by the law of development. It results from the principle of proportion, not only that lives of unequal merit must be unequally treated, but that lives of equal merit must fare equally well. If the accident of birth, color, or sex gives certain persons an advantage over others of equal or greater merit, the law of development is broken. If a fire or flood destroys the property of good and bad alike, or damages some good man while it leaves a bad one undisturbed, the principle of proportion is violated. Earthquakes, tempests, lightnings, etc., and to some extent diseases, fall indiscriminately upon inferior and superior. If the cyclone and lightning could become endowed with powers of intelligent selection,—if discriminating earthquakes would occur each year or two,—if the Angel of Flames could be enlightened, and the Demon of

Disease be harnessed to the Law of Development, the world would not be long in reaching the millennium. But, as we cannot make these powers observe a true proportion, the only thing remaining is to neutralize their force as far as we are able, in order that if we cannot make them work consistently for good, we may at least prevent their giving evil an advantage.

Government should equalize losses through insurance. Insurance rests upon and is justified by the principle of distributing accidental loss, and the same principle of justice that makes it right to spread a loss over the whole number of stockholders or customers of an insurance company, instead of letting it fall in a crushing lump upon the innocent individual that Nature has hurt in her blind rush,—that same principle makes it more right that the loss should be spread over the whole community, or the whole world, and thus destroy completely the favoritism of Nature. It is more just that a particular class should bear the whole of a burden not due to its fault than that an individual should bear it. A disproportion between classes for other cause than disproportion of merit violates the law of development as truly as a similar disproportion between individuals. The public should insure its citizens against loss of property without their fault, workmen against

sickness or accident, and their families and dependents against their death, for in all these ways burdens fall on individuals without their fault, and such burdens ought to be borne by the community in order that equal lives may fare equally well. No accidents or circumstances independent of his own conduct must be allowed to favor or burden any individual, so far as such effects can be prevented without too high cost.

Equal pay for equal work. One result of this principle of the equalization of equal lives is that the same service should receive the same pay whether performed by man, woman, or child. Another is that ultimately all transportation should conform to the principle of the Post Office,—one price regardless of distance,—so that the accident locality may effect individual lives as little as possible.

Diffusion calls for many reforms. A progressive income tax, the limitation of the inheritance of capital, public ownership of monopolies, and the repeal of all indirect taxation, are also deductions from this principle. So also is the public guarantee of a reasonable opportunity to earn an honest living. The state ought to guarantee the innocent poor at least the opportunity to procure as good shelter and food as it provides for the criminals in its jails. Cases

are not rare in which men and women have violated the law for no other purpose than to secure the protection from hunger and cold afforded by a prison, or a home for fallen women. The state cannot starve its arrested criminals, nor expose them to the weather; equal treatment of equally valuable lives requires that innocence should at least fare no worse at the hands of society.

The principle of intelligent selection. Another principle of vital moment in the development of the law and its work of encouraging good and repressing evil, is the replacement of automatic selection by intelligent selection. In the vast series of reactions between groups of men and between each man and the whole physical and social environment, whereby some faculties, individuals, and modes of action are selected for limitation or destruction, and other faculties, individuals, and modes of action are selected for preservation, multiplication, and development, the methods of selection and molding fall into two radically different groups which I shall distinguish as Automatic Selection and Intelligent Selection. The latter involves the use by man of the forces of nature and life, with a conscious purpose of repressing evil, and encouraging good, or in any way molding qualities and conduct into an ideal

form. Automatic Selection includes all species of modification in which this element of intelligent selective purpose is absent.

We may illustrate the principle most vividly perhaps by a reference to the development of animal life. For example, the animals generally used for food by the wolves of a certain island become too few to supply the wants of the wolves, and they have to pursue the deer that dwell in the forests. But the deer are fleeter than most of the wolves. The slow wolves die, —the fast ones live and multiply. Their progeny inherit their qualities. The slowest deer are caught,—the fleetest escape and multiply. The continuous chasing they receive develops their speed still more, and the new generation is swifter than the old one. So the fleeter wolves find a fleeter set of deer, and so the double development and the double destruction go on for hundreds of years, each buying increase of caution, fleetness, and strength with ages of cruel warfare, heartbreaking pursuit, savage and bloody banqueting, famine, and torture-deaths. That is natural selection,[12] the survival of the fittest,[13] in the struggle for ex-

[12] "The preservation of variations that are beneficial to the being under its conditions of existence," *Origin of Species*, p. 63.

[13] Not wholly a fortunate phrase, for it seems to imply the survival of those who are really the best, whereas it

istence. How different the process can be made by man's intelligent direction.

Advantages of intelligence. The fleetness of a race of dogs or horses can be doubled without subjecting them to hunger, cold, or cruelty of any sort. They may live a life of peace and comfort and yet the progress wished for may be made in a hundredth part of the time that Nature's cruel methods would require. It would be done by careful training and breeding from the best.

Intelligent Selection has the most tremendous advantages over Automatic Selection in respect to power, accuracy, rapidity, economy and kindness; nothing is of vaster moment to humanity than the replacement of Automatic Selection by Intelligent Selection, and the improvement to the utmost of the methods of Intelligent Selection.

Nature's processes are very wasteful. She produces a million of germs in order that one may mature. She sows with the wind. Man on the other hand plants carefully the seeds or slips he wishes to grow, gives them proper soil

means only that those who are fittest to meet the conditions of present existence, survive, and, if those conditions are morally bad, as in countries where power and wealth go to conscienceless cunning, instead of to merit, or unselfish service, then the worst will survive, so far as these forces affect the result.

and depth, proper light, heat, moisture and sufficient space that they may not choke each other. Intelligence operates without the terrific wastes and all enveloping chance that harass Nature and compel her to expend a world of energy and eons of time for every atom of progress she procures.

Nature's methods not a pattern for human law. Not only is Automatic Selection very cruel, slow, and wasteful, it is also very inaccurate. It frequently fosters an evil quality because it is linked with a good one, and distributes its encouragements and repressions in proportion to accidents of locality, birth, relationship, lightning, fire, flood, and other things that have nothing to do with the intrinsic virtues and merits of the man.

While Nature, aside from conscious human direction, conforms in a rough general way to the law of development, yet, in many particular instances, she fails of a true application of the principle because of her inability to distinguish between the quality of the soldier, and the eminence on which his battery rests,—between the industry and skill of the farmer, and the fertility or location of his land,—between the use of strength, foresight, or intelligence for moral purpose, and their use for selfish and immoral purpose,—the strongest and cunningest

conquers, whether he is a robber, or the innocent defender of his home, whether he is seeking to ruin a railroad for his private emolument, or endeavoring to save his country from conquest, division or slavery.

The law must discern between good and evil. The incapacity in Mother Nature to draw the line in individual cases, between the man and his circumstances, or between the good and evil use of power and intelligence, tends to obliterate the true connection between character and consequence. Good conduct can not be increased by securing to men advantages in proportion to climate or soil, nearness to a city, other accidental circumstances unconnected with their personal superiorities and defects, or in proportion to anything else whatever than good conduct itself, and the manifestation of qualities that promise it.

It is for us to perfect the application of the principle that underlies the rude justice of Nature, and we have already done something in this direction. Nature left the thief and murderer to private vengeance. On the whole, this made it dangerous to steal or kill, but many times the avenger himself was slain, or the robber retained his booty unmolested. But intelligence entered the game, and the criminal must now destroy eighty millions of people before

he can be safe, and the earth has become a globe of glass that will not hide his flight. The certainty that repression will fall upon the evil-doer is very much greater than when it depended upon automatic selection. Again our civil courts have been established to distribute losses so that they will fall upon demerit, rather than on merit. Instead of leaving the dispute to angry private settlement, in which the strongest or most cunning would succeed without regard to justice, the government steps in, with cool deliberate judgment, to compel the one in fault to bear the loss, to save the innocent from wrong, and give to merit its reward. Thus adding certainty of repressing evil and increasing good.

We still rely too far on natural selection. The work that remains to be accomplished in this matter of substituting Intelligent for Automatic Selection, is to the work that has been done, as North America to the Island of Manhattan. We use the intelligent selection of a court of justice to settle the difficulties of man and man, or of state and state, but we leave the disputes of labor and capital to be adjusted by primitive methods.

We punish one who, by physical strength, wrests the earnings of a citizen from his grasp, but, if he uses mental strength to do the same

bad deed, we do not punish, but applaud his cunning, if it be not too open and direct in its methods. Strength of mind and body in themselves are benefits, but evil modes of action ought to be repressed whatever power be used in their performance. We have applied intelligent selection to the separation and repression of such modes quite perfectly in one case, but far from perfectly in the other and more important one.

Intelligent selection should be applied to human propagation. Again, Intelligent Selection is applied to dogs and horses with wonderful results, but children are left to the primitive plan. Our domestic animals we breed from the best,—ourselves we breed on a very different plan. Population is held in check, so far as it is restrained at all, by the old, cruel, imperfect methods of automatic selection,—by hunger, cold and death, while crime and disease are too often left to propagate themselves with the fertility of desperation.

The training of a race-horse, and the care of sheep and chickens have been carried to the highest degree of perfection that intelligent planning can attain. But the education of a child, and the choice of his employment are left largely to the ancient haphazard plan,—the struggle for existence, the survival of the fittest.

We choose with the utmost care the materials of our public buildings, and polish the columns with marvelous skill. But we pay little or no attention to selecting the best materials for the next generation,—the commonwealth of tomorrow.

We have tried, with very imperfect success, to establish intelligent selection in politics, but we have not brought it to bear to any great extent on industrial life, in order to banish the cruelty, waste, and retarding effects of the old Automatic Selection.

The law should deal with good and evil at their sources. Finally it is of vast importance that the law should go to the sources of good and evil. We are too apt to wait till the epidemic comes and the pestilence is upon us before taking adequate means of stamping out the germs of disease, requiring proper methods of producing and handling our milk supply, meat products, and other foods, and eliminating careless and injurious practices from our methods of living. We are too prone to permit children to grow up under conditions calculated to create incompetent defectives and criminals instead of securing to every child the conditions essential to normal, healthful and moral development and so eradicating the causes of evil at the root.

There is no more potent method of diminishing evil than to kill it in the bud, and prevent the scattering of the seed. And there is no better way of securing good than by nourishing it in the young, and giving it every means of development. Foster the promise of good and cancel the promise of evil. This is one of the most important of all the applications of the principle of Intelligent Selection. We have done comparatively little good work in this direction.

A state, nation or industrial system that gives little attention to education, permits criminals to multiply, leaves the slums of our cities to rot in the vitals of humanity and breed a pestilence for the future, is not making a satisfactory effort to conform to the law of development.

Summary. Summing up the foregoing discussion we may now state in a single paragraph the law of development, or the essential principles to which the law should conform in the process of molding men and institutions to higher types, viz: *the proportional repression of evil actions and qualities, and encouragement of good actions and qualities, by all means not costing more than the worth of what they achieve,* remembering that different methods are proper in different stages of development,

that we must always endeavor to reach the sources of good and evil, to level the effect of accidents, to equalize equally valuable lives, and that it is always of the utmost importance to replace automatic selection by intelligent selection so far as practicable.

X

THE GREAT FUNCTION OF THE LAW IS SERVICE—THE PROMOTION OF GOOD AND THE DIFFUSION OF BENEFIT

Standards of good and evil change. The determination of what is good and what is evil depends upon experience and reason, and varies as we have seen in different times and countries. One age regards slavery as a divine institution. Another age holds slavery in abhorrence but thinks the wage system and competitive industry to be in full accord with justice and the public good. A third age may regard competition and the wage system as only a little more civilized than chattel slavery, holding that the purchase of labor in competitive market is really the purchase of manhood and womanhood at the lowest prices at which the necessities of the workers may compel them to sell; that to buy labor according to the law of supply and demand is to buy men as commodities, degrading manhood to the level of corn and cotton, marble and lead, pig-iron and lumber. In the South before the war, the

planter bought men out and out, took the whole life of a man, and all his labor, and gave back enough to keep him in good condition, because it was the owner's interest to keep him so; in the North to-day, we do nearly the same thing in substance,—we do not buy a whole life at once, but we buy it on the installment plan, a day, a week, a month, a year at a time, and the purchaser in some cases takes the whole, the same as before, but the market price is not always enough to keep the rented life in good condition, and when the worker's prime is past, capital no longer buys his years, but casts him aside for younger men, thus squeezing the life out of each generation so far as possible for the benefit of the employing class, and forfeiting the productive energy and civic and social values that come from a share in the profits and control of industry by the workers.

What is beneficial? Experience and reason down to date appear to have clearly demonstrated that certain conduct, qualities and conditions are beneficial, and certain other conduct, qualities and conditions are detrimental to society as follows:

Beneficial conduct, qualities and conditions:

Security	Good Faith	Character
Liberty	Care	Education
Equality	Efficiency	Knowledge

Justice
Order
Stability
Certainty
Truth
Reliability
Confidence
Prudence
Foresight
Industry
Economy
Association
Combination
Coöperation
Exchange
Health
Wealth
Democracy
Diffusion of benefit
Power over nature
Progress
Science
Art
Invention
Skill
Sympathy
Kindliness
Social purity
Social cohesion

What is detrimental? Detrimental conduct, qualities and conditions, consist of the opposites, absences and denials of the above; and manifest themselves, so far as conduct is concerned, in the following forms:

(1) Direct or positive aggressions such as murder, theft, arson, assault and battery, cruelty, deceit, slander and libel, malicious prosecution, imprisonment of innocent witnesses to keep them on hand till the trial, confinement of young offenders in close contact with veteran criminals, etc., etc.

(2) Indirect or negative aggressions such as failure to fulfill agreement, lack of due care, delay or failure of justice at the hands of the law, etc.

(3) Refusal of voluntary coöperation for valuable purposes such as the exercise of voting franchise, the education of children, administration of justice, etc.

All three classes of actions are negative in greater or less degree to the beneficial elements above enumerated and diminish the coöperation and coherence which constitute the essence of society.

The law is beginning to compel coöperation. The third division is left for the most part to education and ethics. The law does not as a rule attempt to compel coöperation, but confines itself to the prevention and punishment of aggressions and the redistribution of loss occasioned by them. In some cases, however, the law does compel coöperation, as when it demands the payment of taxes, orders men to serve in the army or militia, requires parents to send their children to school until they attain a certain age, or makes property owners coöperate in or contribute to the building of pavements and sewers, the planting of trees, or other public improvement.

Equality as known by the law. The term equality in the above analysis of benefits does not mean per capita equality, in wealth, earnings, or any other element of life. The law does not guarantee equality of possessions any

more than equality of size, weight or ability, neither can it accord the same treatment to a criminal as to a man whose life is highly moral and useful. Equality in the sense of the law means equality of opportunity and the equal treatment of all persons under the same essential circumstances. There is a school of socialists who advocate the equal division of wealth. Two brothers in business or in fact any group of partners or coöperators may voluntarily agree to divide the product or profit of the enterprise equally without regard to the fact that some have greater ability than others and contribute more to the creation of the product. With well developed men the approbation of their fellows, the position and opportunity to manage large affairs that come with proof of ability, efficient service, and happiness inherent in useful and successful work, are sufficient spurs to industry without the added impulse of money payment in proportion to service. But there are in every community men who do not respond as yet to the higher motives and who need the money motive to make them work. Any attempt to secure equal division of wealth or product by legislative authority would tend to enervate this class and would be a serious injustice to the more industrious and conscientious classes of the com-

munity. The law should do its utmost to prevent pauperism on the one hand and the building of fortunes from the unearned increment taken from the product of other men's labor on the other. Equal division by law under present conditions at least, would be a contradiction of the fundamental principles of justice that it is the duty of the law to sustain and enforce. Justice calls for the apportionment of benefit, so far as reasonably possible, in due proportion to merit. It does not accord the man of ability more wives or more votes than his inferiors because in such cases no rational apportionment is reasonably possible. But in the case of payment for service rendered a fairly accurate adjustment of benefit to merit is attainable, so that any establishment of equality in the division of product must be developed to adopt such a system with good results. Industrial education, coöperative industry and social evolution may in time develop a type of man who will work for his country as earnestly as he will fight for it without regard to the money motive. When that time comes it may be possible, if it should then be deemed desirable, to equalize men in respect to wealth and earnings. But as human nature exists today in the mass of men the equalization of

wealth by force of law would be exceedingly unjust and disastrous.

Legal meaning of liberty. Liberty means freedom to do anything that has not been clearly proved to be detrimental to social interests,—(1) full freedom to all that is beneficial to society; (2) freedom also in the field of doubt for the sake of progress; and because happiness of the individual is the object, and liberty one of the primary and most important means of its attainment, the burden of proof in every case is upon those who advocate a limitation of liberty; (3) no freedom at all to do what is clearly contrary to the public good. No one can be allowed any liberty at all to commit murder, theft or arson. Even the freedom of speech and public assembly must be so limited as to exclude aggressions upon individual rights and incitements to disorder and deeds of violence. Nor is it necessary to wait in every case until the dangerous words are spoken before interposing the prohibitions of the law. If you see a man piling brush against your house and about to scratch a match to set it on fire you do not have to wait till the house is ablaze before arresting him.

The law makes for stability. For the sake of stability, certainty and prevision the law draws

broad lines, prescribes forms and methods of procedure, establishes precedents and lays down presumptions. After twenty years your adverse possession becomes a title. You must sue for a tort within six years, and after thirty years a deed or will proves itself, the witnesses being presumed to be dead. If a man or woman is absent for seven years without being heard from, he or she is presumed to be no longer alive and the wife or husband of the absentee may marry again. These are a few illustrations of the tendency to make broad rules to favor the stability and certainty of life and guard against the intrusion of old claims long after the facts and evidence surrounding them had passed into oblivion and the lives of the parties concerned had developed into new lines in apparent security and which the law after the lapse of a reasonable time will not allow to be disturbed.

Usages of business involved in or affecting cases that come before the courts are ascertained by them and enforced if found to be just and reasonable. A large part of the law of contracts and property consists of these usages which have been established in court and judicially approved as elements to be taken into account in interpreting rights, construing

contracts, wills and statutes and in giving judgment.

Some branches of the law are antiquated. Forms and rules, usages and precedents often cling to the law long after the reasons for them have ceased to exist, so that while the mass of the law can be explained on principles of justice and common sense as understood to-day, we have to go back to the feudal system, to Saxon times, and even to the German forests to find the origin and reason for parts of the law. These rudimentary remnants of the past will be found particularly in the law of real estate, and the law of procedure, but appear also in contracts and criminal law and other parts of our system of jurisprudence.[1]

The law is inadequate as yet in securing economy. Economy of time, resources and happiness is a benefit in respect to which the science of the law is inadequate as yet. It is time that cost should determine in large degree the extent of any interference with conduct, and decide which method of prevention and development, the law, education, or public opinion is to be used; but the rate of change in social conditions must not be pushed by the law so

[1] For examples the reader is referred to Sir HENRY MAINE'S *Ancient Law;* and Justice OLIVER WENDELL HOLMES'S book on *The Common Law.*

fast as to make the cost to the present generation greater than the gain. Aside from the subconscious recognition of such limitations, and some efforts, generally inadequate, to keep taxation within reasonable limits, the law has done but little in this field. It has permitted the most reckless destruction of natural resources, mines, forests, etc., for the satisfaction of private greed. It has authorized the waste of vast resources in fruitless attempts to secure competition in public service utilities. And it has permitted and even sanctioned the growth of parasitic industries and classes that annually waste hundreds of millions of our wealth, and cause still greater loss through the debasement of manhood and womanhood they entail.

The law has done much for education. For the sake of progress the law may favor science, literature, art, invention and discovery through the educational system, by the founding and operating of special institutions such as the Smithsonian and the experiment stations of the department of Agriculture, the provision of funds, the offering of prizes, and the granting of temporary monopolies to discoverers, inventors, and authors. Of all the forms of private monopoly, a monopoly of the results of one's own ability and labor is probably the least objectionable. And yet when

we remember that every book and every invention is largely the result of the accumulated wisdom of the past which is the common heritage of mankind and that they owe their value to the existence of highly civilized communities containing millions of purchasers, it becomes evident that books, inventions and discoveries are largely social products. In fact the very training and ability which enable the author and inventor to do their work are themselves the product of modern civilization. It is only necessary to ask what inventions Edison would have made and what books Herbert Spencer or Tennyson would have written if they had been born in the heart of Africa in order to see that the inventor and the author are themselves social products; and even if Edison could have invented the phonograph or Tennyson could have written his poems in the African jungle they would have had no value for lack of a purchasing public.

The law of patents not yet equitable. Such considerations and the fact that nearly every great invention is made by several workers almost simultaneously, and is achieved by adding some slight improvements to the work of preceding inventors and discoverers who worked toward success step by step, generation after generation, each adding a little till the new idea

is fully developed and made practical—all these things make it clear that it is impossible to tell how much of the value of any invention is really due to the man who takes the last step, gets the patent and puts his product in the markets of 80,000,000 of civilized and progressive people who appreciate new ideas and are able to pay for them. In view of all this it is not impossible that in a coöperative community, instead of paying a million a month to the inventor of smokeless powder or the discoverer of the Bessemer process, and nothing per month to the discoverer of *x*-rays or the antitoxin cure for diphtheria, some plan may be devised for making all inventions and discoveries public property with judicial appraisal of their values (subject to revision from time to time in the light of experience and the growing use or disuse of the new production), and the payment of royalties or of life annuities sufficient to constitute a tremendous spur to invention and discovery, but free from the irregularities that affect the present system under which some discoverers receive no special compensation while others accumulate fortunes so great as to be distinctly contrary to public policy and the reasonable diffusion of wealth. Whether or no such a plan proves practicable in the future, we are of course at

present very far from the adoption of such methods, and must make the best of our patent and copyright laws by means of such modifications as experience indicates are necessary to bring them more fully into harmony with justice and the public good.

The law must do more for industrial development. Of all the benefits the law can help society to secure none is of greater moment than coöperation for valuable industrial and social purposes. From the days when our savage ancestors wandered in the primeval forests with little or no coöperation beyond what was necessary for the raising of offspring, down to the present time when every civilized community presents a vast network of coöperation in numberless variety of political, industrial and social forms, the history of the development of civilization has been in large degree the story of the growth of coöperation in larger and larger circles and ever increasing variety. And to-day there is no better test of the degree of civilization to which any community has attained than the extent to which its members have learned to coöperate with each other for their common purposes. The law should do its utmost at all times to favor the growth of coöperation in forms that are in harmony with the public good, and to discourage

and suppress such forms and methods of combination as experience may prove to be contrary to social well-being. This may be accomplished by according profit and advantage to beneficial forms of organization, and attaching loss, disadvantage, penalty and prosecution to detrimental forms of combination.

The whole empire behind every citizen. The extent to which coöperation may be carried and the results which may be achieved by it are well illustrated by the story of Cameron, an English citizen, who, incurring the displeasure of the King of Abyssinia, was, without cause, cast into a dungeon in the fortress of Magdella, on the top of a lofty Abyssinian mountain. It took six months to get word of the situation to Great Britain. When the facts were known the English Government at once demanded Cameron's release. The King refused. Within a few days thereafter, ships of war with ten thousand troops on board were sailing down the African coast. The soldiers marched across six hundred miles of wilderness under a burning sun, climbed the mountain, planted their cannon in front of the fortress, battered down the iron gates, went down into the dungeon and brought forth that British citizen, carried him across the six hundred miles of torrid territory, put him on board a white winged ship and sped him

to his home in safety. That was a splendid thing for a great nation to do. It cost Great Britain $25,000,000 and hundreds of lives. It would have been done no matter what the cost, for every dollar and every life in the Empire is behind each citizen to protect him against injustice and aggression in a foreign land.

But government is not yet awake to its whole duty to its citizens. Suppose Cameron had been found in a London sweatshop, working at exhausting drudgery sixteen hours a day in a filthy, ill-ventilated tenement, for barely enough to keep body and soul together. Would the English Government have interfered in his behalf? Would it have spent $25,000,000 to clear up the slums and stop the sweating of employés? No. Why not? Because civic pride and patriotism have not as yet developed to the same extent as national pride and patriotism. What we need is a civic or domestic patriotism that will put every dollar and every life in the community behind each man to protect him from injustice and aggression at home as well as abroad. And the time is coming when this will be realized. The spirit of justice, brotherhood, kindliness and coöperation is constantly growing. We can see it in the better treatment of women and children, in the laws against cruelty to animals, in the abolition of slavery, in the

diminution of war and the amelioration of conflict, when it does occur—the Red Cross, the humane treatment of prisoners, and the respect for private rights and property in the enemy's territory. We can see it in the trend toward free government that has filled three continents with the light of civilized democracy. We can see it in the growth of industrial and social cooperation and in the wide-spread demand for the better division of wealth and for the elimination of the industrial and social evils that still cling to our civilization. It is only a question of time when the new spirit of justice and brotherhood and civic patriotism will express itself in laws and institutions, and every man will have the same security against injustice in his own country that he now has against injustice in a foreign land.

The law is a great factor in all development. In one age war, conquest and autocratic government weld men into states and nations, and slavery develops habits of continuous toil. In another age competition develops initiative, enterprise, invention, combination, industrial power and dominion. In a third age coöperation may bring industrial peace, security and justice. Each age keeps the benefits worked out under the institutions of its predecessors while seeking to eliminate the evils of the past

through high forms of political, social and industrial organization. In all these changes that fill the history of the race the law is a principal and indispensable factor.

The highest function of law may yet become the dominant one. The motives and character of men change with the changing laws and institutions. Self-development and civic preferment were the dominant motives in Greece. In Rome the ruling passion was military conquest. In the Middle Ages it was religious devotion. In the days of chivalry it was devotion to women and to high ideals of personal honor. To-day the dominant motive is profit, money-getting, commercial conquest. To-morrow the spirit of service or the love of doing good work for its own sake, which already rules the lives of many, may become the dominant social motive, and the prizes of life may be awarded more nearly in proportion to true social values and actual service and less in proportion to mere success in money-getting than is the case at present.

XI

INTERNATIONAL LAW ALSO AIMS AT MOLDING MEN AND INSTITUTIONS TO HIGHER TYPES

International law presents some interesting analogies and equally interesting contrasts with domestic law.

First principle. The first principle of international law is that every nation is equal and independent and has for itself and its citizens a right to security, liberty and property without interference so long as the rights of other nations are not infringed.

Equality of nations and of individuals. The analogy with domestic law is manifest. In the latter every individual is equal before the law and has the fundamental rights of security, liberty and property. In the law of nations every nation is equal before the law and has the same fundamental rights. Nations are not equal in size, strength, wealth or value to the world any more than individuals, but among nations as among individuals justice demands equality of opportunity, equal security and equal liberty so

long as the rights of others are not infringed. If they are not to be equal before the law, if one is to have more right to security, liberty, etc., than another, who is to determine how much liberty each is to possess? It is the same with independence, if nations are not to be regarded by the law as independent who shall determine the degree of dependence that shall belong to each. It is manifestly impossible to arrive at any basis of agreement other than that of equality and independence in the eye of the law.

Applies to nations only. It must be noted that the principle applies only to nations. The law cannot give the same rights to a handful of barbarians as to a powerful civilized people, therefore a broad line is drawn and such groups as are clearly not entitled to equality and independence are cut off by the definition of the word nation. A nation, in international law is a permanent community of considerable size and some degree of civilization, possessing a fixed territory and having a definite and effective political organization with sovereign powers and wholly free from external control.

The distinction between peoples entitled to the rights of nations and those that are not, bears some analogy to the line drawn by domestic law between infancy and maturity; the

latter requiring full age and sound mind as the basis for the rights of citizenship.

Second principle. The second principle of international law is that every nation has the right to use force, strategy and all other necessary means except perfidy [1] to secure redress or prevention when it deems its rights invaded or threatened, or when the rights of another nation are invaded or threatened.

In theory, international law does not sanction aggressive war, but in practice as there is no one but the nation itself to decide whether its rights and interests are endangered, in any case it is easy to find an excuse to wage aggressive war. The only penalty for such violation is the adverse public opinion of the civilized world, which is without adequate means of expression and enforcement.

Restrictions upon warfare. In recent times usage and agreement among nations have placed some limits to the forms of force to be employed in civilized warfare. For example, bullets that explode after striking the body are prohibited. There is a constantly increasing

[1] Perfidy in international law means the violation of compacts made in war or with reference thereto. It is manifest that no state can be allowed the right to break its contracts made in war or in reference to war, otherwise there would be no means of security in terminating war or carrying on negotiations for that end.

tendency to recognize and apply the beneficent principle that the application of force should be confined so far as possible to the clash of armed masses with the least possible interference with the rights and property of private individuals; so that in war between civilized countries, armies no longer kill or maltreat women, children or noncombatants, nor burn and devastate towns and farms as they march through the enemy's country.

Position of other nations. In case of war between two powers other nations may choose whether they will take part in the conflict or remain impartial; a nation may join one belligerent against the other to protect or advance its rights and interests, or to aid a cause it regards as just and worthy of support, as when we aided Cuba in its revolt against Spanish injustice; or when France assisted America to resist the tyranny of England and throw off the yoke of King George.

Duties and rights of neutrals. Nations that choose to be neutral must show no favor to either belligerent, except such reasonable concessions as may have been agreed upon by treaty before the war. They must not sell or forward arms or ammunition to either belligerent, carry any contraband of war, nor the enemy's forces or dispatches on their vessels;

they must not permit any act of war in the neutral territory, such as the raising of an armed force, or equipping of war vessels to go to the aid of either party in the struggle. As an example of the sort of modification of a neutral's duty of impartiality which may be made by treaty before the war, we may name an agreement to allow the privateers of one nation to bring their prizes into port while excluding the privateers of her enemies.

Neutrals must not interfere with the following rights that usage has accorded to belligerents: (1) Search of vessels on the high seas to see if they belong to the enemy, carry the enemy's goods, or contraband of war to an enemy's port, etc. (2) Confiscation of enemy's goods found in neutral merchant vessels. (3) Blockade of enemy's ports. The right of search flows from the necessity of ascertaining what is the enemy's property in order to exercise the right of capture.

On the other hand, the rights of nations that remain neutral must be respected as in time of peace, and any property found to be neutral must be treated as it would be if there were no war.

If a nation claiming to be neutral violates any right of a belligerent or favors either side beyond what may be stipulated for by reason-

able treaty prior to hostilities, she forfeits her right to protection as a neutral, puts herself in the list of enemies and may be treated accordingly.

The need for international organization to enforce international law. The contrast with domestic law in respect to the means of enforcing rights, is very strong. The individual citizen is not allowed to undertake the administration of justice on his own account. He must not seek to punish, nor to obtain redress by force, nor even to defend his rights by force except in cases of emergency when there is not time nor opportunity to call upon the law. The nation, on the other hand, is obliged to administer justice on its own account because there is not international organization to which it can appeal for the protection and enforcement of its rights. It may take the matter to the Hague Court or arbitrate it in some other way if the other party to the controversy is willing, but there is no international police or armed authority representing a world organization to compel the nations to do justice in their relations with each other. There is reason to believe that this will follow in the course of time. The Hague tribunal is the beginning. A Parliament of Nations and an International Army and Navy to enforce the decrees of the court

and require submission of disputes to judicial decision in all cases, will surely follow.[2] This will enable the nations to disband their armies and build their navies for commerce instead of war. It will free an enormous volume of social force for the arts of peace and the purposes of civilization, and work a change similar to that which took place when the organization of the state freed individuals from the necessity of spending a great part of their time and resources in conflict, or in preparation for it, as the only means of defense against the aggressions of their fellows.

The coming of universal peace. As intelligence and sympathy increase, as commerce grows, as democracy develops and the common people who have to do the fighting come into full control in the various countries, international organization and disarmament will be inevitable and the time will come that Tennyson dreamed of in *Locksley Hall:*

"Till the war-drum throbb'd no longer, and the battle-flags were furl'd
In the Parliament of man, the Federation of the world."

[2] Read *World Organization,* by RAYMOND BRIDGMAN.

XII

THE LAW IS A RESERVOIR OF SOCIAL PROGRESS

The law as a reservoir. The law is a reservoir of social progress, and this reservoir will become stagnant unless it have an outlet and an inlet. Into it the new life of this age must flow; it must circulate and permeate the whole and the outworn forms of the past must go out. A stream that undammed is dissipated so that its bed becomes dry when water is most needed, will, properly dammed and conserved, irrigate miles of land and make it bear wonderful crops. The law is such a reservoir for social progress.

Perhaps a better illustration is that of a firmly built foundation on which the edifice of social progress is built up into the sunlight and air. Below all fine civilization and social progress, lies the firm foundation of a slowly and painfully hammered out legal system. The coral insect, deep in the ocean, lives, builds its little accretion of enduring stone and dies, each one bearing the coral stone nearer to the light and top; it is thus with those who aid in in-

creasing the lasting accretions of our legal system.

Progress leads; law follows. Social progress leads; the law follows. Laws cannot and should not be very far in advance of the people. Ordinarily there should be a distinct majority, if only of influence, in favor of a law; otherwise it cannot be enforced, and unenforced laws lessen the respect for all law and tend to lawlessness or anarchy. Hence public opinion must be educated by radicalism up to at least a moderate demand for a law before it should be enacted, and then still further educated to the law's enforcement and improvement. Not until a predominating section of the community will support a law, should it become effective.

Individuals in advance. Often men are in favor of a law which is itself morally in advance of them. Thus a drunkard, knowing the evils of drink, may sincerely favor stringent liquor laws. I have known gamblers who, though drawn almost irresistibly to a gambling house, wish everyone was closed so that they could not gratify their vice. Men have been known to work ardently for the limitation or prohibition of their own particular vice. Most everyone will publicly support the moral side of a question, even those who, if it were enacted,

might secretly violate the law. "Hypocrisy is vice's homage to virtue," said some wise man, and so moral advances in laws are always, publicly, well supported.

Law naturally conservative. Law is naturally conservative. It comes from the past and all but a very small accretion belongs to the past. Its face is turned backward looking at precedents and past rules. It frequently does not see present conditions which are different from past ones. Every good quality when carried to excess, becomes some bad quality. The great good quality of the law, is its stability, its strength, its conserving power; when carried to excess, this becomes rigidity, immobility, resistance to progress and change and when completely degenerated it becomes an involved technical system tied up with red tape which works for the form's sake and not for the sake of justice.

Radicalism must advance. Radicalism must always go in advance of the law which holds it in check. Radicalism is the centrifugal force which tends to throw away customs, forms, and institutions; law is the centripetal force which draws them toward a conserving center. Either working alone, means ruin and destruction; both working harmoniously together mean

beneficent social development. When radicalism has proven itself good, wise and constructive and when the public has accepted it, it becomes a part of the law and ceases to be radical. Hence we will find institutions which are an accepted and conservative part of the framework of society in one country, advocated in another by the extreme radicals; yet at the same time, the second country may have in conserving operation a well-established institution which in the first country is only hoped for by the extremest radicals. Thus Norway has the Gothenburg system of liquor selling; control and diminution is in such successful operation that no one considers its abolition. It is a conservative part of the law there. In the United States, it is only advocated by radicals with a few imperfect and tentative attempts here and there. But on the contrary, in several of our states we have already the initiative and referendum embedded in the state constitutions and have always used the referendum on all constitutions and constitutional amendments; in these places it has ceased to be radical and becomes a conserving part of the stable law. In Norway, on the contrary, the initiative and referendum are only feebly advocated by a few progressive thinkers. Radicalism is not an absolute but a relative school of thought. It

stands for the things that the government is not ready to do.

No government radical. Hence it is that no government is really radical. As soon as it gets into power, it must enforce the laws as they are, therefore, it is only able to make slow changes. This is why extreme radicals are always disappointed when their party gets into power; from the very nature of its situation, it must conserve and can only make changes slowly and with due regard for the conditions which have been created by past laws, even laws which under present social conditions are working injustice. The change must be made gradually lest the immediate evils following from a too rapid change may be greater than the goods of the reform. This is a danger which the public rarely, and the radicals still less rarely, see. Hence they say the radical in power has gone back on his principles. Thus Premier Clemenceau of France has spoken and written most radical things and associated with the trade unionist and socialist, and yet as Premier of France he sides with the State and the law of the State in putting down the strike of his former associates; he thereby shows his true statesmanship and understanding of his position as head of the legal system which has been built up in France. No government can be

strongly radical; for radicalism in England or any other country, you must look outside of the Radical party.

Progress secured at cost. It is well that we have a great conserving reservoir of the past. Progress must always be secured at some cost and that cost consists of two things,—the striving of the radicals under the impulse of ideals to carry new laws or to educate society to the point where it will enact new laws, and the cramping of society by outworn laws before it generates the energy to slough them off and create new forms. It is far better, generally, to secure progress at the expense of some cramping because not obtained fast enough, than to sacrifice it to the whims and passing passion of a great radical uprooting. Thus, in our own country, it would have been an immense financial saving to say nothing of the still more enormous savings of life, energy and love, if the nation could have paid the South the full market price of the negro slaves before the breaking out of the Civil War, but owing to the passions aroused, war was a greatly to be regretted necessity.

Law not necessarily reactionary. While law is seldom in advance of public opinion, and often far in the rear, it is a serious error to view the law as essentially reactionary and over-con-

servative. Accepted legal doctrine is, on the whole, as radical as human nature will stand for. There is nothing in the fundamentals of the law to prevent progress or to impede the development of the highest and noblest social institutions.

Law holds germs of progress. In fact, the greatest and profoundest legal doctrines lay sure foundations for higher civilization and open the way for formal and regular progress to it. Search carefully the fundamentals of law and in them you will find, though perhaps in undeveloped form, the germs of all social progress, of all true reform, of even that which seems at present the most radical and quite impossible of attainment. The upper crust of legal enactments may hamper and bind society till it burst them, but below, in the roots of the law, are the germs, the reasons, the arguments of all true radicalism.

Law's elasticity. There is an elasticity as well as rigidity in the law, its doctrines are superior to its specific regulations but it has no dogmas other than moral or social axioms, and it follows, therefore, that the law can be, as it has been, adapted to the progress that men and society make, and no legal doctrine or theory can prevent this adaptation. There is no such power in precedents as to forbid the enact-

ment of new statutes, the revisions of constitutions and charters, the rendering of new decisions, or the creation of new principles of construction, where these are needed to conform to newly accepted ideals or to fit new conditions. The law's forms and precedents built up under now old and obsolete ideals and conditions may hamper society, but search below these nearly dead forms and precedents for the real roots of the law and you will find great, far-reaching principles. These may be drawn on to justify, to condition, to really build up the new statute law and precedent needed by changed conditions of society and by society's further developed and larger ideals. Too many people, seeing only the old and likely worn-out precedent, say the law is antique and cramping. Let them dig down to its fundamental principles for the justification of progress.

Recognition of the law's social service. There is no more fundamental, far-reaching reform needed to-day than this recognition of the broader scope of the law and the larger field for fundamental activities that is contained in its principles. The service function of the law and "the promotion of the general welfare" clause of the constitution are the lines along which the progress of the future will be made; as war and crime decrease, as police activities

grow less, more and more will be accomplished in the development of civic usefulness and the accomplishment of greater social service for the people by their governments. This, more than any other one thing, is to-day the great movement in law and tendency of government.

Change in law's ideals. Law is the peg which when once driven into a progress, holds society there till that progress may be made an integral part of its civilization and from which further progress may be made. But with this progress there is, at the present time rapidly coming on a change in the law's ideals and methods. This change will increase greatly the benefit of law to civilization. The ten commandments are a bundle of negatives. In this, they are typical of all old law. Old laws mainly enacted punishments; the best modern criminologists, truly representing the fundamental change which is coming over the law's ideals and methods, are substituting reformation for punishment, they are abandoning the negative ideal, and have taken up the positive ideal. This change has taken place not only in the law as applied to individuals, but as to society and social conditions, until our legislative halls resound with talk about the effect of laws on society.

Silently and almost unobserved has this

change crept over the spirit of law. Its germ was embedded in ancient law, but the development of that germ is modern and its rapid development has taken place in our own time. It will accomplish itself more and more rapidly in the future. Law, from being negative, prohibitive, individual, primitive, is becoming positive, permissive, social and creative. It is adjusting the framework of society more and more so as to permit liberty of individual action and yet exerts its force to draw up individuals to lofty ideals of common and social action. This is a view of the law that needs to be more generally understood.

Social consciousness. In thus holding up social ideals, in being permissive and creative, law will continue to develop in the minds of men a social consciousness that each is a living and vital part of the social whole, with duties as well as rights. The relation between the law and a vital social consciousness is that of action and reaction, the law playing a more active part than is often appreciated. We have talked much of late about a new social consciousness, and well we may, but there is an element of the prophetic in our talk. There is much for the law to do for the masses in the further development of that consciousness.

Social conscience. Concurrent with the mak-

ing of a great social consciousness, but different, is the development of social conscience. No force is greater than the law in the creation in men of that social conscience which will say that every child, no matter how poorly born, shall have the fullest opportunity for development that is possible; that every man willing to work, shall have the opportunity for healthful work and hopeful rest; that every locality can develop freely and fully; that present righteousness is greater than precedent; that human life shall take precedence over property rights. The law is helping to create the conscience which in turn will make the new law expressing itself. This view of the law is above and beyond the specific schemes and formal rules of the socialists of various schools, it transcends the narrow comprehension of pur-blind anti-socialists and so-called individualists; yet it grasps the best ideals of both and builds upon the good foundations of the past and present. The law is here. It fits human life on the whole fairly well. It is far in advance of many. It is a great uplifting force to the masses. And law is to hold fast that which we have gained, as well as to be the arena in which the spheres of individual and communal development are slowly and painfully to be molded and remolded and given definition.